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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 407

GEORGE B. MONROE, RECEIVER, PETITIONER,

vs.

LOUIS RAPHAEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1932

CERTIORARI GRANTED NOVEMBER 7, 1932

(37,104)

(37,104)

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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3293, Equity Docket

J. B. Hirshfeld & Co., Inc., et al., Plaintiffs,

v.

The Monroe Stores, Inc., Defendant

Appeal of Louis Raphael

Agreed Statement as to Record on Appeal by Louis Raphael—Filed February 6, 1932

On the appeal by Louis Raphael in the above-entitled cause, it is hereby stipulated and agreed that certain papers and proceedings in said cause, hereinafter specified, shall not be printed in extenso as part of the record on said appeal, but that in lieu thereof the following summaries and statements concerning such papers and proceedings and the contents thereof shall be printed by the clerk as part of the record on said appeal:

A. The original bill of complaint in said case was filed in said United States District Court for the District of Massa- [fol. 2] chusetts on July 14, 1930. The plaintiffs named in said bill are J. B. Hirshfeld & Co., Inc., Le Roi Hosiery Company, James H. Dunham Company and Waterproof Novelty Company. The defendant in said bill is Monroe Stores, Inc., a Massachusetts corporation having an usual place of business in Massachusetts.

Said bill alleges that the four plaintiffs were creditors of the defendant for goods sold and delivered in sums aggregating $5,246.58; that the total liabilities of the defendant corporation were in excess of $95,000; that the creditors of the defendant were numerous; that the defendant was engaged in the business of operating chain stores for the sale of dry goods; that the defendant's assets exceeded its liabilities; that its assets were so invested that it could not pay its debts as they matured without a great sacrifice in

value; that the creditors were pressing for payment; that attachments had been made and that others were threatened; that a receiver was necessary in order to conserve its assets and to avoid threatened attachments, waste and loss. The bill prayed for the appointment of a receiver. Said bill was filed by Andrew J. Aldridge, Esquire, as attorney for the plaintiffs.

B. An order of notice dated July 14, 1930, was issued on said bill of complaint directing said defendant, Monroe Stores, Inc., to show cause why a receiver should not be appointed. Said order of notice was returnable on July 21, 1930. Due and sufficient service was accepted thereon by Thomas W. Morris, Esquire, of Boston, as counsel for the defendant.

C. The answer of the defendant Monroe Stores, Inc., to said bill of complaint was filed on July 29, 1930. The answer admitted all the allegations of the bill and assented to the prayer for the appointment of a receiver. The answer was filed by said Thomas W. Morris, Esquire, as attorney for said defendant, Monroe Stores, Inc.

D. On July 23, 1930, a decree was entered by said District Court in said equity proceeding, appointing George B. Monroe of Quincy, Massachusetts (the treasurer of Monroe Stores, Inc.), as receiver, with authority to carry on the [fol. 3] business of said defendant corporation. On the same day said George B. Monroe qualified as receiver by filing a bond in the sum of ten thousand (10,000) dollars.

E. On July 28, 1930, upon a petition filed that day by said receiver, an order was entered authorizing him to employ said Andrew J. Aldridge, Esquire, and Thomas W. Morris, Esquire, as counsel for the receiver.

F. On November 10, 1930, said receiver filed a petition for leave to advertise for sealed bids for all the assets and property of the defendant corporation, including cash on hand, merchandise, fixtures, good will and all other assets. An order allowing said petition was entered on November 10, 1930.

G. On November 25, 1930, Harold A. Dempsey filed an offer to purchase said assets mentioned in said receiver's petition, a copy of which offer is annexed as "Exhibit A"

to the petition entitled "Petition by Louis Raphael, a Creditor of Said Monroe Stores, Inc., for Leave to Institute Proceedings Upon Bond", said petition being printed in extenso as part of this record on appeal and being referred to in the præcipe on appeal as document No. 3.

H. The statements concerning said offer and concerning the other proceedings set forth in the petition entitled "Petition by Louis Raphael, a Creditor of Said Monroe Stores, Inc., for Leave to Institute Proceedings Upon Bond" and numbered 3 in the præcipe are true, and the copies of the offer and of the bond thereto annexed as "Exhibits A" and "B" are true and correct copies of said respective documents. On March 23, 1931, an order was duly entered by said United States District Court for the District of Massachusetts (Lowell, J.), allowing said petition.

I. In pursuance to said order entered on March 23, 1931, the appellant as relator, did on April 9, 1931 file a bill in equity in the Superior Court for the County of Suffolk entitled "United States of America ex rel., Louis Raphael, Plaintiff, v. Harold A. Dempsey, Clifford S. Drake and Louis F. Buff, Defendants", and numbered 37782 Equity in said court. Said defendants Dempsey, Drake and Buff were respectively the principal and sureties on said bond. Said bill seeks to reach and apply, under Massachusetts G. L. Chap. 214, Sec. 3, Clause 7, certain shares of stock and other [fol. 4] property of said defendants therein named to the payment of the amount of the dividend due the appellant on his claim as a creditor of said Monroe Stores, Inc., which had been duly proved and allowed in the sum of thirty-five thousand dollars ($35,000) in said equity receivership of Monroe Stores, Inc. in said United States District Court. The statements set forth in the Plea of Louis Raphael (No. 11 in the præcipe on appeal) with respect to said proceedings in the Suffolk Superior Court in said case of United States of America ex rel. Louis Raphael v. Dempsey et al., and with respect to the proceedings in said United States District Court in said case of J. B. Hirshfeld & Co., Inc., et al. v. Monroe Stores, Inc., are true.

J. In the ancillary bill of complaint, referred to as document No. 5 in the præcipe, the amount due creditors as dividends on claims duly proved and allowed in the re-

ceivership proceedings is alleged in the fourth paragraph thereof to be $33,026.87. The attorney for the receiver who drafted this ancillary bill of complaint in computing said amount included as a part thereof the sum of $9,300 as the balance of the dividend due on the claim of the appellant, Louis Raphael.

K. In pursuance to the order dated October 21, 1931, entered on the petition for contempt, which order is referred to as document No. 8 in the præcipe, Clifford S. Drake and Louis F. Buff, the sureties on the bond, are paying to Andrew J. Aldridge, Esquire, as attorney for the receiver, one thousand dollars ($1,000) per month.

Mark M. Horblit, Benjamin Goldman, Attorneys for Louis Raphael, Appellant. A. J. Aldridge, Attorney for George B. Monroe, Receiver.

The bill of complaint in this cause was filed in the clerk's office on the fourteenth day of July, A. D. 1930, and was duly entered at the June Term of this court, A. D. 1930.

[fol. 5] In United States District Court

Affidavits of Clifford S. Drake and Louis F. Buff, Qualifying as Sureties on Bond of Harold A. Dempsey—Filed with Bond, December 2, 1930

Affidavit of Clifford S. Drake—December 2d, 1930

I, Clifford S. Drake of North Hampton in the State of New Hampshire and residing in Cambridge in the County of Middlesex, Massachusetts and having a usual place of business in Boston, Massachusetts hereby certify that the attached hereto is a complete list of my property.

It will be noticed that my free and clear real estate at assessed values totals $80,255.00 and that I have an equity in three pieces of real estate amounting to $12,600 at assessed values.

I also own outright not less than $75,000 worth of tax titles. I own first mortgages amounting to $5,000 and I have good stock exchange collateral worth $29,000.00 making total assets of not less than $201,855.00 and my lia-

bilities do not exceed $43,600.00 making my net worth not less than $158,255.00.

Clifford S. Drake.

Boston, Mass., Dec. 2, 1930.

Subscribed and sworn to before me. Edith G. Rollins, Deputy Clerk United States District Court, Mass. Dist.

List of Properties—December 1, 1930

		Assessment
Boston	Albany & Curve St., $3 per sq. ft.	$2,400
"	23 Willard Street, 1324 Feet	4,000
"	57 Fay Street, 808 feet	2,500
So. Boston	155 Gold St. corner Harding Ce. 736 ft	400
Charlestown	2 Auburn Avenue, 1541 sq. ft.	400
"	61 Russell Street, 1484 ft. (land)	2,300
"	4 Roughan Road, three-family	3,200
"	Lawrence Avenue, 7507 feet	400

[fol. 6]

Roxbury	Lot 103 Fisher Ave., 5005 ft	1,300
"	Lot 102 Fisher Ave., 4306 ft	1,100
Billerica	Lots 47-52 Riverbank Terrace, bungalow	200
Braintree	Harbor Villa Ave., Lots 49-53, 8000 ft	730
"	Trefton Drive, Lots 160-1, 10,000 ft	700
Cambridge	441 Concord Ave., 10352 ft., land	1,500
Chelsea	30 Walnut Avenue, 1058 ft., building	3,000
Dedham	Riverside Drive, Lots 40-1 Pine Heights 7631 ft	700
"	Oak St., Lot 77, 6080 ft. (betterment asst.)	600
Everett	Vale St., Lots 101-3	1,700
Lowell	Lot 9 Mt. Grove St. cor 6th St. 6320 ft	500
"	Lot 6-7 Mt. Grove St., 21526 ft. Pawtucketville	1,500
"	Lots 14-18 Fenwick St., 2380 ft	3,900
"	Lot 1 Tanner St., 9094 ft	1,350
Medford	Rock Glen Circle, 9776 ft., Lot 219	500
"	Lot 87 Codding Ave., 3405 ft	300
"	Lot 85 Codding Ave., 3152 ft	300
"	Lot 82 Codding Ave., 3215 ft	400
"	Lot 172 Saunders Street, 3883 ft	200
"	Lot 15 Lewis St., 2607 ft	300
"	Lot 118 Fells Ave., Granite Rd., 4228 ft	250
"	Lincoln St. No. 49	3,900
North Hampton	Summer residence	10,000
Quincy	112 Island Ave., Plot 22-3 1300 ft. building	1,500
"	Lot 81 Beebe Road, 2500 ft	200
"	Lot 79 Beebe Road, 2500 ft	200
"	Minahans Lane & Forest St., 12952 ft. 5 room house	1,000
"	Lots 361-2 Division St., 5115 ft	400
Revere	Lots 233-5 Savage St., 6000 ft	500
"	Crest Avenue, adjoining #16, 5522 ft	1,500

[fol. 7]

Saugus	787 Broadway, 189000 ft. building	3,000
"	Broadway corner Treher St., 40x105	800
"	Lot A-202 Saugus Ave., 3904 ft	275
"	Lots 78-9 Palmettos Street, building	700
"	30-42-44 Bristow St., 6 lots 15000 ft. blds	4,300
"	Lots 163-4 Sqan and Raven Rd., 4312 ft. 2794 ft.	800

			Assessment
Saugus	Lots 148-150 Dewey St		825
Watertown	Lot 7 Orchard St., 1782 ft		100
"	Lot 6 Orchard St., 2030 ft		100
"	Lot 79 Bradshaw St., 1714 ft		100
"	Lot 78 Bradshaw St., 1726 ft		100
"	Lot 78A Bradshaw St., 1503 ft		100
Winthrop	Lot B River Road, 3380 ft		450
Haverhill	Lots 163-4 Brook St. 12367 ft		1,650
"	Lots 10-11-12 Seventeenth Ave., 12516 ft		725
"	Lot 13 Primrose St. 3888 sq. ft		150
Waltham	Sterling Road 5000 ft		250
Cambridge	79 Upland Road		7,800
Everett	45 Fuller St. Sold $2200. No mortgages		2,200
			80,255
Cambridge	134-136 Fayerweather St	$7,800	
	56-68 Saville St	7,800	
	86-88 Fitchburg St	10,000	
		25,600	
	3 mortgages aggregating	13,000	
		12,600	12,600
			92,855

[fol. 8] AFFIDAVIT OF LOUIS F. BUFF

I, Louis F. Buff, of 34 Alveston Street, Jamaica Plain, Massachusetts, President of the Buff & Buff Manufacturing Company, Manufacturers of Surveying Instruments for use of civil engineers, etc., offer myself a surety in the sum of one hundred thousand dollars ($100,000.00), in the above case, and on oath depose and say that I am more than twenty-one years of age, and that I have real estate in Boston, Massachusetts, consisting of a

		Equity
Brick building,—802 Washington Street,		
Assessed value	$89,000	
Mortgage	40,000	
		$49,000
11,200 feet of land,—419 Columbus Ave	134,000	
	40,000	
		94,000
Seven brick buildings—3 stores each—bounded by Vale, Thornton and Fuldar Sts	135,000	
	82,000	
		53,000
150,000 7% Preferred Stock of the Henrici Laundry Machinery Co., of 61 West Selden St., Dorchester, Mass. (total issue of said stock is $165,000)		150,000
		$346,000

and that there are no unsatisfied judgments or executions standing against me, and that the amount of my debts and liabilities of every kind, absolute and conditional, does not

exceed mortgages as above of $162,000, and that I am under no bond other than this on said property; that my credit is good, and that I am worth in good property not less than $600,000 over and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances, and lawful claims upon my property.

Louis F. Buff.

[fol. 9] Boston, Mass., December 2, 1930.

Subscribed and sworn to before me. Edith G. Rollins, Deputy Clerk United States District Court, Mass. Dist.

IN UNITED STATES DISTRICT COURT

PETITION BY LOUIS RAPHAEL, A CREDITOR OF SAID MONROE STORES, INC., FOR LEAVE TO INSTITUTE PROCEEDINGS UPON BOND—Filed and Allowed March 23, 1931

To the Honorable the Judges of the United States District Court for the District of Massachusetts:

The petition of Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut, respectfully shows:

1. That shortly prior to November 26, 1930, one Harold F. Dempsey of Boston, in the County of Suffolk, in said District, made an offer in writing to purchase from George B. Monroe, the receiver of the assets of Monroe Stores, Inc., theretofore appointed by this court in these proceedings, all the assets of said corporation of every name, nature, character and kind and wheresoever situated, a copy of which offer is hereto annexed marked "A"; that said original offer is filed in this court and is part of the record of the proceedings in said cause; that by the terms of said offer said Harold F. Dempsey offered, among other things, to pay to the creditors of said Monroe Stores, Inc., a sum equal to 30 per cent of their respective claims in or within thirty (30) days after their claims had been duly approved and allowed; that by said offer said Harold F. Dempsey offered to file in court a bond in the penal sum of one hundred thousand dollars ($100,000), with good and sufficient sureties, the conditions of said bond being that if the said

Dempsey shall perform the obligations of said offer, that said bond shall be null and void, and that otherwise it shall be in full force and effect and the sureties liable thereon.

[fol. 10] 2. That on or about November 26, 1930, said written offer of said Harold F. Dempsey was duly accepted by said receiver of said Monroe Stores, Inc., in pursuance to an order of this court, and that thereafter said Harold F. Dempsey filed in this court a bond in the penal sum of one hundred thousand dollars ($100,000), a copy of which is hereto annexed marked "B"; that by the terms of said bond said Harold F. Dempsey, as principal, and one Louis F. Buff of said Boston and one Clifford S. Drake of Northampton, in the State of New Hampshire, as sureties, bound and obliged themselves unto the United States of America in the full and just sum of one hundred thousand dollars, to secure the performance by said Harold F. Dempsey of all the conditions and items of said offer; that said bond and said sureties thereon were duly approved by the court on December 2, 1930.

3. That prior to said written offer the court had issued an order requiring persons holding claims against said Monroe Stores, Inc., to present their proofs of claim therefor to said receiver for allowance on or before September 30, 1930; that the time fixed in said order was later extended by the court to November 15, 1930.

4. That on or about September 25, 1930, your petitioner duly presented to said receiver his proof of claim; that thereafter, to wit, on or about February 9, 1931, said proof of claim was duly approved and allowed in the sum of thirty-five thousand dollars ($35,000); that said Harold F. Dempsey, the purchaser of said assets and the principal on the bond above referred to, and said Louis F. Buff and Clifford S. Drake, the sureties on said bond, duly approved said claim and the amount thereof and the allowance thereof, and duly assented to and approved said allowance by their respective counsel; that by the terms of said written offer, and under the provisions of said bond filed in connection therewith, your petitioner became entitled to receive from said Harold F. Dempsey in thirty days thereafter 30 per cent of the amount in which said proof of claim was allowed, to wit, 30 per cent of $35,000, i. e., ten thousand

five hundred dollars($10,500); that on or about March 12, 1931, your petitioner duly demanded payment of said sum of $10,500; that your petitioner made said demand upon the [fol. 11] said Harold F. Dempsey, and also communicated with said receiver; that said sum has not been paid to your petitioner, and that your petitioner thereafter made further demands upon said sureties on said bond.

5. That your petitioner has received through counsel for said Harold F. Dempsey on account of the amount due him as aforesaid, under the provisions of said offer to purchase said assets and under the provisions of said bond, the sum of only twelve hundred dollars ($1,200); that your petitioner is entitled to receive the balance of nine thousand three hundred dollars ($9,300) with interest thereon from March 11, 1931, when demand for payment was duly made by him as aforesaid.

6. That upon acceptance of said offer and upon the filing and approval of said bond, the receiver of said Monroe Stores, Inc. did, in consideration thereof, convey and deliver to said purchaser, Harold F. Dempsey, all the assets of said Monroe Stores, Inc., which assets were of great value; that in justice and in equity, the said principal and sureties on said bond should be forthwith compelled to pay to your petitioner the balance of said 30 per cent of the amount in which your petitioner's said claim was approved and allowed.

Wherefore your petitioner prays that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce said obligation of said principal and said sureties on said bond, and for such other and further orders and decrees as to this Honorable Court may seem meet and proper.

Dated this twenty-third day of March, 1931.

Louis Raphael, by His Attorneys, Mark M. Horblit, Benjamin Goldman.

Duly sworn to by Mark M. Horblit. Jurat omitted in printing.

[fol. 12] March 23, 1931.

LOWELL, J.:

Petition allowed; leave to sue granted to petitioner, Louis Raphael.

Attest:

John E. Gilman, Deputy Clerk.

A

UNITED STATES OF AMERICA:

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

J. B. HIRSHFIELD CO., INC.,

v.

MONROE STORES, INC.

OFFER

Herewith is enclosed certified checks for $10,000 accompanying my bid.

Pursuant to the order of the District Court of the United States for the District of Massachusetts entered on the 12th day of November, 1930, in the matter of Hirshfield v. Monroe Stores, #3293, Equity, I, the undersigned, offer to purchase all of the assets of every name, nature, character and kind and wheresoever situated and without limiting the generality of the foregoing, said offer shall include all merchandise, fixtures, stock in trade, cash in bank, good-will, leaseholds, etc., of George B. Monroe, Receiver of The Monroe Stores, Inc. on the following terms and conditions:

1. I will pay thirty per cent of the claims of all the creditors of The Monroe Stores, Inc. in or within thirty days after their claims have been duly approved and allowed, it being understood that said creditors shall include only those creditors who have filed their proof of claim with the Receiver pursuant to the order of this Court on or before the 15th day of November, 1930. It is further

understood that I shall have the right to contest any and all claims in which the Receiver sets forth a good objection to the allowance of said claims.

[fol. 13] 2. I will pay any and all liabilities of the Receiver within thirty days after said claims against the Receiver have been duly allowed by this Court. It is understood that in no event shall the claims against the Receiver exceed $20,000.00, which shall include claims against the Receiver for the purchase of merchandise, administration expenses, counsel fees, etc.

3. I will, within ten days after the sale of the assets has been duly confirmed by this court, transfer all of said assets or their equivalent to a corporation already organized or to be organized with the following capital structure:

25,000 shares of preferred stock—$10 par value.
100,000 " " Class A " —no " "
1,000 " " " B " — " " "

3-A. The preferred stock shall pay cumulative dividends at the rate of 7% per annum, quarterly annually. The holders of the preferred stock shall have no voting rights except in the event that four successive dividends on said preferred stock remain unpaid at which time it will have the exclusive voting rights until said accrued dividends are paid or a sufficient amount set aside thereof for its payment.

The preferred stock may be called on 30 days' notice in whole or in part at the rate of $11 per share plus accrued dividends due and unpaid thereon.

In the event of dissolution and liquidation, whether voluntary or unvoluntary, the net proceeds of the entire assets of the company shall be first applied to the payment to the holders of the preferred stock of the sum of $10 per share and accrued and unpaid dividends thereof, and the balance of the net proceeds, if any, shall be divided among the holders of the Class A and Class B stocks, 50% to go to Class A and 50% to go to Class B stock.

3-B. After dividends have been paid or set aside on preferred stock the Class B stock shall be entitled to dividends at the rate of $12 per share per annum which shall be non-cumulative. Each share of Class B stock issued

[fol. 14] and outstanding shall be entitled to 100 votes at any stockholders' meeting of the aforesaid corporation so long as preferred stock is not entitled to vote as aforesaid.

3-C. After dividends have been paid or set aside on the preferred stock and the Class B stock as aforesaid, the Class A stock shall be entitled to dividends at the rate of 60c. per share per annum which shall be non-cumulative.

4. In any one year in which dividends are declared or set aside on Class A stock up to and including 60c. per share and on Class B stock up to and including $12.00 per share, any and all dividends declared during said year shall be declared 50% to the Class A stock and 50% to the Class B stock issued and outstanding. Each share of Class A stock issued and outstanding shall have one vote at any stockholders' meeting of the aforesaid corporation so long as the preferred stock is not entitled to voting rights as aforesaid.

5-A. The stockholders of The Monroe Stores, Inc. may acquire preferred stock of the aforesaid corporation at the rate of 20% of their present preferred stock holdings in The Monroe Stores, Inc. upon payment of $10.00 per share for said preferred stock of said aforesaid corporation and receive five shares of Class A stock of the aforesaid corporation for each share of the preferred stock of the aforesaid corporation acquired by them, providing they acquire and pay for preferred stock of the aforesaid corporation on or before the 15th day of January 1931.

6. It is understood that I am to receive 1,000 shares of Class B stock of the aforesaid corporation and to receive any and all money advanced and paid by me or for my account plus a bonus of $25,000.00.

7. I will, within seven days from the acceptance of this offer, present to the court a bond in the penal sum of $100,000.00 with good and sufficient sureties, the conditions of the bond being that if I perform the obligations of the offer said bond shall be null and void, otherwise it shall be in full force and effect and the sureties liable thereon.

8. Upon acceptance of this offer by the court and upon approval of said bond, said sale shall be confirmed by the

[fol. 15] court and the assets of George B. Monroe, receiver of The Monroe Stores, Inc. shall forthwith be transferred, set over and assigned to me, free and clear of any and all liens and/or encumbrances.

9. In the event my offer is not accepted on the 25th day of November, 1930, my offer is hereby revoked and the $10,000 in certified checks are to be returned to me. Time is of the essence of the offer.

Harold A. Dempsey. Ralph H. Robb, Counsel.

B

Bond

Know all men by these presents that I, Harold A. Dempsey of Boston in the County of Suffolk and Commonwealth of Massachusetts, as Principal, and Louis F. Buff of Boston, Suffolk County, Mass., and Clifford S. Drake of North Hampton in the State of New Hampshire as sureties are firmly bound and obliged unto the United States of America, in the full and just sum of $100,000 to the payment of which to the said United States of America, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally, firmly by these presents.

The conditions of this obligation are such, that whereas, in Equity Case #3293, now pending in this District Court of the United States, District of Massachusetts, entitled J. B. Hirschfeld & Co., Inc., et als. vs. The Monroe Stores, Inc., Harold A. Dempsey made an offer in writing to purchase all of the assets of every name, nature, character, and kind and wheresoever situated, of George B. Munroe, Receiver of said The Monroe Stores Inc. as more fully set forth in said offer, and

Whereas, in connection with said offer a bond guaranteeing the performance of the conditions and terms of said offer is required.

Now, therefore, if the said Harold A. Dempsey shall com- [fol. 16] ply with all the conditions and items of said offer then this obligation to be void, otherwise to be and remain in full force and effect.

In Witness Whereof we hereunto set our hands and seals this 26th day of November A. D. 1930.

Harold A. Dempsey, Louis F. Buff, Clifford S. Drake.

Witness to all signatures: Ralph H. Robb.

Approved [initials] Dec. 2, 1930.

IN UNITED STATES DISTRICT COURT

ANCILLARY BILL OF COMPLAINT—Filed April 16, 1931

Comes now your petitioner, the United States of America, and alleges as follows:

1. That heretofore and on the, to wit, the twenty-first day of July, 1930, George B. Monroe of Quincy, Massachusetts, was duly appointed receiver of the assets of The Monroe Stores, Inc., and thereafter the said George B. Monroe duly qualified as receiver; that on the, to wit, the twenty-fifth day of November, 1930, by an order of this court, all the assets of The Monroe Stores, Inc., were sold by George B. Monroe, receiver, to one Harold A. Dempsey upon the terms and conditions as set forth in the offer filed by the said Harold A. Dempsey in this court, reference to which is hereby made, which said offer was duly accepted; that on the, to wit, the twenty-sixth day of November, 1930, pursuant to a decree entered on the offer to purchase in this cause, reference to which is hereby made, the said Harold A. Dempsey filed his bond in the penal sum of one hundred thousand (100,000) dollars, payable to the United States of America. The condition of such bond was a faithful performance of all the terms and conditions of the offer of purchase filed in this cause by the said Harold A. Dempsey and on the decree entered thereon.

2. That Louis F. Buff of Boston, Massachusetts, and Clifford S. Drake of Cambridge, Massachusetts, signed and [fol. 17] executed such bond as sureties for the said Harold A. Dempsey; said bond is filed in this cause, reference to same is hereby made.

3. That Harold A. Dempsey is a citizen and resident of the city of Boston, Commonwealth of Massachusetts; that Louis F. Buff is a citizen and resident of the city of Boston, Commonwealth of Massachusetts; that Clifford S. Drake, although he claims a residence in the State of New Hampshire, is actually a resident of the city of Cambridge, Commonwealth of Massachusetts, and lives at No. 79 Upland Road, Cambridge, Massachusetts.

4. That pursuant to the terms of said offer and decree thereon, the said Harold A. Dempsey agreed to pay all the expenses and obligations of the receiver of the Monroe Stores, Inc., and thirty (30) percent of the face amount of the claims of the creditors of the Monroe Stores, Inc., which were approved and allowed by this court. There is due from the said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts due the creditors who have filed their claims, and which claims have been allowed by this court, a total balance of thirty-four thousand eight hundred fifty-six dollars and fourteen cents ($34,856.14); that more than thirty (30) days have elapsed since said claims were approved and allowed by this court, and the payments thereon are past due and now owing. The obligations of the receiver which have not been paid by the said Harold A. Dempsey are past due and now owing; that demand has been made upon the said Harold A. Dempsey for the payment of the balance due on account of the receiver's obligations and expenses, and on account of claims due and allowed by this court, but the said Harold A. Dempsey has failed and refused to pay same and continues to fail and refuse to pay same.

5. That Harold A. Dempsey, the principal and maker of such bond, is the owner of both real and personal property situate and being in the Commonwealth of Massachusetts in the name of Harold A. Dempsey. The said Harold A. Dempsey has deposits in banks duly organized under the laws of the United States of America, which said banks have usual places of business in Boston and/or trust com- [fol. 18] panies duly organized and existing under the laws of the Commonwealth of Massachusetts.

6. That said Louis F. Buff signed and executed the aforesaid bond as surety; that said Louis F. Buff is financially

interested in, either through stock ownership or otherwise, the following corporations: The Babson Dow Machinery Company, the Buff & Buff Manufacturing Company, and the Henrici Laundry Company, all corporations duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts; that said Louis F. Buff is the owner of various parcels of real estate located in the Commonwealth of Massachusetts and the owner of personal property located in the Commonwealth of Massachusetts; that the said Louis F. Buff has deposits with various national banks duly organized and existing under the laws of the United States of America and having usual places of business in the Commonwealth of Massachusetts, and more particularly in the city of Boston, and various trust companies duly organized and existing under the laws of the Commonwealth of Massachusetts and having usual places of business in the city of Boston, which said bank deposits are either in the name of Louis F. Buff and/or L. F. Buff and/or Louis F. Buff with descriptive words such as "trustee", "special account", "R. E. Special Account" and/or "R. E. Trustee Account", and otherwise.

7. That said Clifford S. Drake is actually a citizen and resident of the city of Cambridge, but claims to be a citizen and resident of the State of New Hampshire. The said Clifford S. Drake resides at 79 Upland Road, Cambridge, Massachusetts; that Clifford S. Drake signed and executed the aforesaid bond as surety; that Clifford S. Drake is the owner of various tracts of real estate located in the Commonwealth of Massachusetts, the record legal title to such properties standing in the name of either Clifford S. Drake and/or Ida M. Hodgdon and/or Louise C. Castleman or other parties; that said property is owned by the said Clifford S. Drake but upon information and belief the record title to said properties is in the names of Ida M. Hodgdon and/or Louise C. Castleman and other parties for the purpose of hindering, delaying and defrauding the creditors [fol. 19] of the said Clifford S. Drake and more particularly to hinder and delay the payment of the balance due on account of the purchase price of the assets of The Monroe Stores, Inc., by Harold A. Dempsey.

Upon information and belief the said Clifford S. Drake is the owner of a large amount of real estate situate and

being in the State of New Hampshire, which said property is either in the name of Clifford S. Drake and/or Ida M. Hodgdon and/or Louise C. Castleman; that the said Clifford S. Drake has deposited with the Atlantic National Bank of Boston a large amount of securities and has given to the said Atlantic National Bank of Boston mortgages on various tracts of land to secure loans; that the value of said properties, both real and personal, are in excess of the amount due or to become due on said loan and that there is a large equity in said properties which can be reached and applied to the payment of the balance due on account of the purchase price of the assets of The Monroe Stores, Inc.; that the said Clifford S. Drake is the owner of various deposits in banks having usual places of business in Boston, which said banks are duly organized under the laws of the United States of America and/or trust companies duly organized and existing under the laws of the Commonwealth of Massachusetts, having usual places of business in Boston and/or Waltham and/or Cambridge.

8. That the said Harold A. Dempsey, although he appears as a purchaser of the assets, your petitioner alleges, upon information and belief, that the said Louis F. Buff and Clifford S. Drake are the real parties in interest and the real purchasers of the assets of The Monroe Stores, Inc.

Wherefore your petitioner prays:

1. That this court issue an injunction against the said Harold A. Dempsey, the said Clifford S. Drake, the said Louis F. Buff, the said Ida M. Hodgdon and the said Louise C. Castleman enjoining each and all and every one of said parties from transferring, conveying, assigning or in any manner disposing of any of the properties, real or personal, standing in the name of Harold A. Dempsey and/or [fol. 20] Louis F. Buff and/or Clifford S. Drake and/or Louise C. Castleman and/or Ida M. Hodgdon.

2. That the said Harold A. Dempsey and/or Louis F. Buff and/or Clifford S. Drake be ordered and directed to pay over to the clerk of the United States District Court for the use and benefit of the receiver of The Monroe Stores, Inc., the creditors of the receiver and the creditors of The

Monroe Stores, Inc., the balance due on account of the purchase price of the assets of The Monroe Stores, Inc.

3. That the said Harold A. Dempsey, Louis F. Buff, Clifford S. Drake and/or Ida M. Hodgdon be enjoined from disposing, transferring, conveying, assigning or encumbering any of the properties of any of the aforesaid parties or of any moneys, credits or deposits of any of the aforesaid parties deposited in any bank or banks, trust companies or trust companies or in the possession of any of said parties during the pendency of this action.

4. That the said Louis F. Buff and the said Harold A. Dempsey and the said Clifford S. Drake be ordered and directed to appear before this Honorable Court and to disclose the properties and assets owned by them, and for such other and further relief as may be meet and just.

5. That a writ of attachment be issued attaching the interest of the said Clifford S. Drake in the equity of the securities and other assets pledged with the Atlantic National Bank of Boston by the said Clifford S. Drake as security for the loan or loans made by the Atlantic National Bank of Boston to Clifford S. Drake.

The United States of America, by Andrew J. Aldridge, Attorney.

Duly sworn to by Andrew J. Aldridge. Jurat omitted in printing.

[fol. 21] Let an order of notice issue returnable April 27th.

J. A. L., D. J.

April 16, 1931.

IN UNITED STATES DISTRICT COURT

INTERLOCUTORY DECREE FOR INJUNCTION, ETC.—May 4, 1931

LOWELL, J.:

This cause came on to be heard at this sitting and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that Harold A. Dempsey of Boston, Commonwealth of Massachusetts,

Louis F. Buff of Boston, Commonwealth of Massachusetts, and Clifford S. Drake of Cambridge, Commonwealth of Massachusetts, defendants, be and they are hereby enjoined and restrained from transferring, conveying, assigning, encumbering, hypothecating, or in any other manner disposing of any property real, personal or mixed of whatever nature or kind, owned by them or any of them, individually or otherwise, whether standing in their name or names of any other person until further order of this court.

It is further ordered, adjudged and decreed that the said Harold A. Dempsey, Louis F. Buff and Clifford S. Drake be and they are hereby enjoined and restrained from disposing of by checks, drafts, acceptances, orders, or otherwise, any of the moneys, funds, credits, deposits, commercial or otherwise, belonging to them or any of them standing in the name of or deposited to their credit or standing in the name of or deposited to the credit of any other person or persons in any bank or banks, trust company or trust companies or in the possession of any of them until further order of this court.

It is further ordered, adjudged and decreed that the said [fol. 22] Harold A. Dempsey, Louis F. Buff and Clifford S. Drake and each of them be and they are hereby enjoined and restrained from drawing and/or executing any checks, drafts or other instruments of whatever nature or kind, transferring any moneys, funds or credits standing in their name or in the name of any of them or standing in the name of any other person or persons or any bank or banks, trust company or trust companies until the further order of this court.

It is further ordered, adjudged and decreed that the said Clifford S. Drake be and he hereby is enjoined and restrained from transferring, conveying, assigning, encumbering, hypothecating, or in any other manner disposing of any property real or personal standing in his name or in the name of Louise C. Castleman and/or Ida M. Hodgdon until the further order of this court.

It is further ordered, adjudged and decreed that the said Clifford S. Drake be and he hereby is enjoined and restrained from transferring, assigning, conveying, encumbering, hypothecating, or in any other manner disposing of the equity in the securities or other assets pledged by him

to the Atlantic National Bank of Boston, as security for a loan, until the further order of this court.

It is further ordered, adjudged and decreed that the pleadings be completed by not later than Friday, May 8, 1931.

It is further ordered, adjudged and decreed that this cause be referred to Marcus Morton, Jr. of Cambridge, Commonwealth of Massachusetts, as special master to hear the parties and their evidence and to find the facts and report the same together with his conclusions thereon to this court in accordance with the equity rules together with such parts of the evidence as any party may, in writing, request.

It is further ordered, adjudged and decreed that the special master proceed as expeditiously as practicable; that he may sit anywhere within the District as he may determine or elsewhere by consent of the parties; that his compensation shall be at the rate of twenty-five (25) dollars per day to be taxed in the cost of the party prevailing.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

[fol. 23] May 4, 1931.

J. A. L., D. J.

IN UNITED STATES DISTRICT COURT

FINAL DECREE ON ANCILLARY BILL OF THE UNITED STATES AGAINST CLIFFORD S. DRAKE ET AL.—July 16, 1931

LOWELL, J.:

This cause came on to be heard at this sitting and was argued by counsel and, all parties consenting hereto, upon consideration thereof, it is ordered adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83 together with costs be entered against the defendants Clifford S. Drake, Louis F. Buff and Harold A. Dempsey, jointly and severally, and that execution issue forthwith.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

July 16, 1931.

J. A. L., D. J.

In United States District Court

Receiver's Petition for Contempt as to Defendants Louis F. Buff and Clifford S. Drake—Filed October 7, 1931

Now comes George B. Monroe, as he is receiver of The Monroe Store, Inc. and alleges:

1. That he was duly appointed receiver of the assets of The Monroe Stores, Inc. by a decree of this court, reference to which is hereby made and made a part hereof.

2. On about the, to wit, the twenty-fifth day of Novem- [fol. 24] ber, 1930, pursuant to an order of this court, the assets of The Monroe Stores, Inc. were sold to one Harold A. Dempsey of Boston.

3. That the offer to purchase said assets was filed in this court and was accepted by an order of this court; that said offer, in substance, provided that Harold A. Dempsey would pay to the creditors of The Monroe Stores, Inc. thirty percent (30%) of the claims approved and allowed by this court against The Monroe Stores, Inc. in or within thirty (30) days of the approval and allowance of the claims by this court, and also would pay all debts and obligations of the receiver. Reference is hereby made to the offer and the decree thereon and both are made a part hereof.

4. That Harold A. Dempsey was required to file a bond with the clerk of the United States District Court for the District of Massachusetts, payable to the United States of America, conditioned for the faithful performance of the obligations undertaken by him, and Louis F. Buff and Clifford S. Drake signed and executed said bond as sureties.

5. That, upon information and belief, Harold A. Dempsey was not the real purchaser of the assets of The Monroe Stores, Inc. but your petitioner is informed and believes and therefore alleges that Louis F. Buff and Clifford S. Drake were the real parties in interest and were the real purchasers of said assets.

6. That at the time Louis F. Buff and Clifford S. Drake qualified as sureties on the bond of Harold A. Dempsey, Louis F. Buff made oath before a deputy clerk of the

United States District Court for the District of Massachusetts that he was worth approximately six hundred thousand dollars ($600,000) and filed a statement with the clerk of the United States District Court showing net assets of three hundred and forty-six thousand dollars ($346,000); that Clifford S. Drake made oath before a deputy clerk of the United States District Court for the District of Massachusetts that he was worth net one hundred fifty-eight thousand two hundred fifty-five dollars ($158,255).

7. That heretofore and on the, to wit, the fourth day of May, 1931, a decree was entered in this cause enjoining Harold A. Dempsey, Louis F. Buff and Clifford S. Drake [fol. 25] from transferring, assigning and/or in any manner disposing of any of their properties. Your petitioner is informed and believes and upon such information and belief alleges that Clifford S. Drake, in violation of the injunction entered in this cause, has transferred, assigned or disposed of property belonging to him.

8. Your petitioner is informed and believes, and upon such information and belief alleges, that the schedule of assets filed by the said Clifford S. Drake with the deputy clerk of the United States District Court was false in this, that the said Clifford S. Drake did not own seventy-five thousand dollars ($75,000) worth of tax titles as set forth in said schedule.

9. That Harold A. Dempsey, Louis F. Buff and Clifford S. Drake failed to carry out the agreement made by them with this court, namely, to pay to the creditors of The Monroe Stores, Inc. thirty per cent (30%) of the amount of their claims which were approved by this court for payment and failed to pay all the obligations of the receiver, and on the, to wit, the sixteenth day of April, 1931, suit by an ancillary bill of complaint was filed in this court in this cause against said parties and on the, to wit, the sixteenth day of July, 1931, judgment in the sum of 32,026.83/100 dollars was entered against each of said parties.

10. That thereafter execution was issued on said judgment which was placed in the hands of the United States marshal for this District and thereafter the United States marshal made demand for the payment of the execution, but said Harold A. Dempsey, Louis F. Buff and Clifford S.

Drake have failed and refused to pay said judgment and said execution remains unpaid and unsatisfied.

11. That on the, to wit, the twenty-first day of September, 1931, counsel representing the receiver and counsel representing the said Louis F. Buff and Clifford S. Drake appeared before this court, in chambers, and counsel on behalf of the said Louis F. Buff and Clifford S. Drake agreed with this court that said Louis F. Buff and said Clifford S. Drake would, if given an opportunity, pay and satisfy said judgment and your petitioner alleges that since [fol. 26] said date no funds have been paid to your petitioner on account of said judgment.

12. Your petitioner is informed and believes and upon such information and belief alleges that from and after the first day of March, 1931, the said Louis F. Buff and Clifford S. Drake have endeavored to evade the obligation and duties entered into by them with this court and have knowingly and purposely attempted to frustrate and evade the orders and decrees of this court and have knowingly entered into undertakings with this court with no intention or purpose of carrying same out.

13. Your petitioner is informed and believes and upon such information and belief alleges that said Louis F. Buff and Clifford S. Drake have been and now are attempting to avoid the payment of their obligations to the creditors of The Monroe Stores, Inc.

14. Your petitioner is informed and believes and upon such information and belief alleges that said Louis F. Buff and Clifford S. Drake have attempted to purchase claims of the creditors of The Monroe Stores, Inc. for sums less than the amount agreed upon by them with this court in violation of their obligations in an agreement with this court to pay said creditors thirty cents ($.30) on the dollar and have, through their agents and/or representatives, caused to be written letters to the creditors of The Monroe Stores, Inc. containing false and fraudulent statements to the effect that the principal and sureties on the bond filed in this court were not financially responsible. Copies of such letters are hereto attached and made a part hereof.

15. That your petitioner is informed and believes and upon such information and belief alleges that said Louis F.

Buff and Clifford S. Drake are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment in this cause but have failed and refused to pay or satisfy said judgment.

16. That from and after the first day of March, 1931, the said Louis F. Buff and Clifford S. Drake have attempted to [fol. 27] hinder and delay your petitioner in the administration of his duties as receiver of the assets of The Monroe Stores, Inc. by failing and refusing to pay to your receiver the sums due on account of the claims filed by the creditors of The Monroe Stores, Inc. with your receiver.

Wherefore your petitioner prays:

1. That an order or decree of this court may be issued citing the said Louis F. Buff and the said Clifford S. Drake to show cause why they should not be adjudged in contempt.

2. And for such other and further relief as may seem meet and just.

Respectfully submitted.

George B. Monroe, Receiver, by A. J. Aldridge, Attorney.

[On letterhead of the Credit Clearing House Adjustment Corporation, 665 Atlantic Avenue, Boston, Mass.]

August 3, 1931.

Re Monroe Stores

We recently wrote you relative to our being able to get settlement of your claim on the basis of 15% and although the majority of creditors have accepted, a number of them have made no comments whatever, which includes your claim.

From what we are able to gather, the funds available for this settlement are limited, and the party advancing the money now informs us that he will not entertain settlements of any kind unless such creditor's intent to accept, is with him not later than August 10th.

From our viewpoint of the matter, it is a case where those creditors who accept 15% in settlement of their claim will receive their money and the probabilities are that creditors who do not accept, will receive nothing on their claims, and by reason of the ultimatum given us on acceptances or intent of acceptances being limited until August 10th, we are giving you the opportunity of signifying your intent of accepting such within that time.

If it is your desire to assent, it will be to your interest to inform us at once.

Yours very truly, The Credit Clearing House Adjustment Corporation.

[fol. 28] [On back:] Received Aug. 44, 1931. Laing Brothers Co., per C. E. B. CHJ.

[On letterhead of the Credit Clearing House Adjustment Corporation, 665 Atlantic Avenue, Boston, Mass.]

To the creditors of Monroe Stores, Inc., Boston and vicinity:

You no doubt are familiar with this Receivership, in that an offer was made for the assets—for a sum equivalent to 30% of creditors' claims, in which the Clerk directed the Receiver to transfer the assets; which accordingly was done at the time.

For the full and faithful performance of the obligation a bond signed by the Principal, and two individuals, as sureties, was given, rather than a surety bond—which, in most instances is demanded. The result (you undoubtedly are likewise aware of) is that no payments have been made by the purchaser or sureties—none of them financially responsible; by reason of which creditors' remedy would be filing a suit against the Principal and sureties in the United States District Court; and although such action has been started by various creditors, one of them we understand has obtained a judgment—but cannot collect thereupon.

There is a possibility, of course, through the non-payment of such judgment, that the Principal might be brought in upon suit charges; but from our investigation of the matter, in all probabilities would likewise result in little monetary benefit to such creditors.

Your claim is comparatively small, and it would not seem to us that it would warrant such expense, as it would necessitate each creditor bringing an individual action as a beneficiary under the bond; and, as we are representing a good number of creditors started with such action, whereupon we have received an offer of compromise in the amount of 15%—that is 15% of the original claim, we believe that we can recover this amount for you if you are willing to accept it. If so, kindly inform us, when we will send on to you at once an assignment of the claim to be surrendered upon the payment of said 15%.

Very truly yours, The Credit Clearing House Adjustment Corporation.

CHK. RC.

[fol. 29] [On back:] Received Jul. 22, 1931. Laing Brothers Co., per C. E. B. C. H. J.

IN UNITED STATES DISTRICT COURT

ORDER ON PETITION FOR CONTEMPT—October 21, 1931

LOWELL, J.:

This cause came on to be heard at this sitting, was argued by counsel and all parties consenting hereto, upon consideration thereof, it is ordered that defendants Louis F. Buff, Clifford S. Drake and Harold A. Dempsey transfer and assign to George B. Monroe, receiver of The Monroe Stores, Inc., their claim or claims against the W. E. Noyes Company and/or the estate of W. E. Noyes Company and/or the trustee in bankruptcy of the W. E. Noyes Company, which said bankruptcy cause is now pending in the United States District Court for the District of Massachusetts before the Honorable Charles C. Cabot, referee, being No. 49001.

It is further ordered that the defendants Louis F. Buff and Clifford S. Drake pay to George B. Monroe, receiver of The Monroe Stores, Inc., the sum of one thousand dollars ($1,000) on the twentieth day of October, 1931, and a like sum on the twentieth day of each month thereafter until the execution issued on the judgment in the matter of J. B. Hirshfeld & Co., Inc., et als. v. Clifford S. Drake et al.

(Ancillary Bill of Complaint, Equity No. 3293), is satisfied.

It is further ordered that the final disposition of this matter be held pending the further orders of this court.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

October 21, 1931.

J. A. L., D. J.

[fol. 30] In United States District Court

Motion of George B. Monroe to Amend Order Allowing Louis Raphael to Bring Suit in the Superior Court for the County of Suffolk Against Louis F. Buff, Clifford S. Drake, and Harold A. Dempsey—Filed November 27, 1931

Comes now your petitioner George B. Monroe, as he is receiver of The Monroe Stores, Inc., and moves the court to modify the order heretofore entered on the, to wit, the twenty-third day of March, 1931, by this court in which said order one Louis Raphael was permitted to sue, in the name of the United States of America for his own benefit, Louis F. Buff, Harold A. Dempsey and Clifford S. Drake on a bond given in this court in the above-entitled cause by said parties in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, and for grounds thereof your petitioner sets down and assigns the following:

1. That at the time the said order was issued no suit was pending against the said defendants, Louis F. Buff, Harold A. Dempsey and Clifford S. Drake, in this court on said bond, but thereafter on or about the sixteenth day of April, 1931, your petitioner filed an ancillary bill of complaint against the said defendants on said bond and thereafter on the, to wit, the sixteenth day of July, 1931, judgment in the sum of thirty-three thousand twenty-six dollars and eighty-nine cents ($33,026.89) was entered against the said defendants, which judgment included the sum of nine thousand three hundred dollars ($9,300) due Louis Raphael.

2. That on the, to wit, the nineteenth day of October, 1931, upon a petition filed in this court by your petitioner citing the said defendants for contempt for failure to pay the judgment for $33,026.89 this court entered an order

directing the defendants to pay to your petitioner the sum of one thousand dollars ($1,000) per month until the full amount of the execution on said judgment is paid, which order the defendants have and are now complying with. The said Louis Raphael has prosecuted his suit in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, and has made a motion for a final decree in [fol. 31] said cause, a copy of which is hereto attached and made a part hereof; that if the said Louis Raphael is permitted to proceed further in said cause in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, the proper and orderly administration of the receivership in this court will be seriously interfered with; that this court had original jurisdiction in this matter and now has jurisdiction in this cause.

Wherefore, your petitioner prays that the order heretofore entered on the twenty-third day of March, 1931, permitting the said Louis Raphael to sue on said bond be modified and that the said Louis Raphael be enjoined from further prosecuting his cause of action; that the said Louis Raphael, his attorneys, servants and agents be enjoined from further prosecuting his cause of action in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, except insofar as to reduce his claim to judgment, and for such other and further relief as to this court may seem meet and just.

Respectfully submitted.

George B. Monroe, Receiver, by A. J. Aldridge, Attorney.

[Copy]

Commonwealth of Massachusetts,
Suffolk, ss:

Superior Court

In Equity. 37782

United States of America ex Rel. Louis Raphael
vs.
Harold A. Dempsey et al.

Final Decree

This cause came on to be heard at this sitting upon the plaintiff's motion for the entry of a final decree and was

argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That the defendants, Harold A. Dempsey, the principal on the bond referred to in the bill of complaint and Clifford S. Drake and Louis F. Buff, the sureties on said bond, are jointly and severally indebted to Louis Raphael, the relator [fol. 32] named in the bill of complaint in the sum of $9300.00, together with interest thereon from March 12, 1931 to the date of the entry of this decree amounting to $390.60, making a total indebtedness of $9690.60.

2. That said defendants, Dempsey, Drake and Buff pay to said relator within thirty days hereafter the amount of their said joint and several indebtedness to said relator, namely $9690.60 together with costs taxed as at law in the sum of $— making a total of $—.

3. That said relator has a right to reach in these proceedings the stock certificates, mortgages, real estate and bank deposits found in the master's report to be owned by each of the respective defendants and to have the same sold and applied toward the satisfaction of said indebtedness, in the event that said defendants shall fail to satisfy said indebtedness within the time provided in paragraph 2 hereof.

4. That —— ——, Esq., be, and he hereby is, appointed special master; that in the event of failure on the part of said defendants, Dempsey, Drake and Buff to satisfy said indebedness and costs within the time provided by paragraph 2 hereof, said special master is hereby authorized and ordered forthwith thereafter to take possession of and to sell at public auction all right, title and interest of said several defendants in and to the following property found in the master's report to be owned by said respective defendants, to wit:

a. The certificates owned by the defendant, Drake representing 100 shares of preferred stock of Mullins Mfg. Co. referred to in paragraph 25 of the master's report.

b. The several parcels of land owned by the defendant, Drake referred to in Exhibit F annexed to the master's report.

c. The mortgages held by said defendant, Drake and referred to in paragraph 28 of the master's report and amounting approximately to $150,000.00.

d. Certificates owned by said defendant, Buff representing 125 shares of W. E. Noyes Co., referred to in paragraph 19 of the master's report.

e. The certificates owned by said defendant, Buff representing shares of capital stock of the defendant, Henrici [fol. 33] Laundry Machinery Co. aggregating in par value the sum of $150,000.00 referred to in paragraph numbered 21 of the master's report.

f. The certificates owned by said defendant, Buff represting 140 shares of first preferred stock, 40 shares of the second preferred stock and 523 shares of the common stock of Babson Dow Mfg. Co. referred to in paragraph 22 of the master's report.

g. The certificates owned by said defendant, Buff representing shares of capital stock of Buff & Buff Mfg. Co., referred to in paragraph 23 of the master's report.

5. In the event that said amount of $— or any part thereof shall remain unpaid after the lapse of thirty days from the date hereof, said defendant Drake is hereby ordered to deliver to said special master forthwith, upon demand thereafter made by him, the following:

a. Said certificates for 100 shares of preferred stock of Mullins Mfg. Co. endorsed in blank.

b. All the unrecorded deeds from the respective nominees of said Drake conveying to him the respective parcels referred to in said Exhibit F annexed to the master's report.

c. All the mortgage notes and mortgage deeds referred to in paragraph 28 of the master's report.

d. Assignments of each of said mortgages, in common form, duly signed, sealed and acknowledged by said Drake transferring and assigning said mortgages, and the notes and debts secured thereby to such person or persons as said special master shall in writing direct.

e. A deed or deeds duly signed, sealed and acknowledged by said defendant, Drake conveying to such person or per-

sons as said special master shall in writing direct the several parcels of real estate referred to in Exhibit F annexed to the plaintiff's declaration.

6. In the event that said amount of $— or any part thereof shall remain unpaid after the lapse of thirty days from the date hereof, said defendant Buff is hereby ordered to deliver to said special master forthwith upon demand thereafter made by him, the following:

[fol. 34] a. Said certificates for 125 shares of stock of W. E. Noyes Co. endorsed in blank.

b. Said certificates representing shares of capital stock of Henrici Laundry Machinery Company endorsed in blank.

c. Said certificates representing 140 shares first preferred, 40 shares second preferred and 523 shares common stock of Babson Dow Mfg. Co.

d. Certificates representing all the shares of capital stock owned by said defendant, Buff in Buff & Buff Mfg. Co.

7. Said special master is hereby ordered to apply the proceeds of such sales, after deducting the expenses of the sales and reasonable compensation for his services, toward the full satisfaction of said execution or of any amount then remaining due thereon, the balance, if any, thereafter remaining of the proceeds of said sales shall be paid out by the special master to said defendants in proportion to the amount received from the sales by the special master of the property owned by said respective defendants.

8. In the event that the net amount received by the special master from the sale of said property mentioned above is insufficient to satisfy the damages and costs established herein, after the payment of said expenses of sale and said compensation to the special master, then execution shall issue in favor of the plaintiff for the balance of said damages and costs.

By the Court.

IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND ORDER OF NOTICE—November 30, 1931

LOWELL, J.:

Upon the filing of a motion to amend order allowing Louis Raphael to bring suit in the Superior Court for the County of Suffolk against Louis F. Buff, Clifford S. Drake and Harold A. Dempsey this day, and it appearing that there is danger of irreparable injury to the defendant from delay, it is

Ordered that said Louis Raphael be restrained from further prosecuting his cause of action brought pursuant to [fol. 35] an order of said District Court of March 23, 1931, which permitted said Louis Raphael to sue, in the name of the United States of America, for the benefit of himself, Louis F. Buff, Harold A. Dempsey and Clifford S. Drake on a bond given in said District Court in the above-entitled case by said parties in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, pending a hearing upon the prayer of George B. Monroe, receiver of The Monroe Stores, Inc., for a preliminary injunction and until further order of the court, and it is further

Ordered that said Louis Raphael show cause on Thursday, December 3, 1931, at 10 o'clock in the morning, why the prayer of said motion to amend order allowing Louis Raphael to bring suit in the Superior Court for the County of Suffolk against Louis F. Buff, Clifford S. Drake and Harold A. Dempsey should not be granted and a preliminary injunction should not issue; and it is further ordered that notice be given to said Louis Raphael by said receiver by serving him with a copy of this order forthwith.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

November 30, 1931.

J. A. L., D. J.

UNITED STATES OF AMERICA,
Massachusetts District:

Boston, Mass., December 1, 1931.

I hereby certify that I have this day served the within restraining order and order of notice upon Mark Horblit by

giving to him in hand at Boston, in said District, a true and attested copy of the within order.

William J. Keville, United States Marshal, by J. A. Gately, Deputy.

Service, $2; travel, .06—$2.06.

[fol. 36] In United States District Court

Plea of Louis Raphael—Filed December 3, 1931

Now comes Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut and, appearing specially upon the order directed to him to show cause why the prayer of the motion filed in said cause on November 30, 1931, by George B. Monroe, as receiver of Monroe Stores, Inc. should not be allowed, says as follows:

1. That on November 26, 1930, a decree was entered in these proceedings ordering said receiver to convey all the assets of said Monroe Stores, Inc. to one Harold A. Dempsey, upon the filing of a bond by said Dempsey in the penal sum of one hundred thousand dollars ($100,000) conditioned to pay each creditor of said Monroe Stores, Inc., in or within 30 days after the allowance of his claim, a sum equal to 30 percent of the amount of his claim as so allowed; that on or about December 2, 1930, said Dempsey did file in this court a bond in the penal sum of one hundred thousand dollars ($100,000), upon which bond, one Louis F. Buff and one Clifford S. Drake are sureties, and that said receiver did thereupon convey to said Dempsey all the assets of said Monroe Stores, Inc.

2. That on September 25, 1930, said Louis Raphael duly filed his proof of claim in said receivership proceedings and that on February 9, 1931, his said claim was duly allowed in the sum of thirty-five thousand dollars ($35,000), said Harold A. Dempsey, Louis F. Buff and Clifford S. Drake, by their counsel, assenting to the allowance of said claim in said amount; that said Raphael thereupon became entitled to receive from said Dempsey, within 30 days after the allowance of his said claim, the sum of ten thousand five hundred dollars ($10,500), being 30 percent of the amount in

which said claim was allowed; that on March 12, 1931, said 30 day period having expired, said Raphael duly demanded payment of the amount due him on said claim; that said Drake and Buff paid to said Raphael on account thereof [fol. 37] the sum of twelve hundred dollars ($1,200), leaving a balance of ninety-three hundred dollars ($9,300) due him on his said claim.

3. That on March 23, 1931, said Raphael, after conferring with said receiver and with his knowledge, filed in this court a petition for leave to sue the principal and sureties on said bond; that on said date this court duly entered an order granting to said Raphael leave to sue as prayed for in said petition.

4. That in pursuance to said order entered by this court, said Raphael did, on April 9, 1931, file in the Superior Court of the Commonwealth of Massachusetts for the County of Suffolk proceedings against the principal and sureties on said bond, said proceedings being entitled "United States of America, ex rel. Louis Raphael v. Harold A. Dempsey et al." and being numbered 37782 Equity on the docket of said Superior Court; that said receiver was not named as a party in said Superior Court proceedings and has never appeared therein or become a party thereto; that on May 25, 1931, said Dempsey, Drake and Buff filed a motion to dismiss said Superior Court proceedings, alleging as a ground therefor the pendency in this court of an ancillary bill of complaint filed against them in this court in the case of J. B. Hirshfeld & Co. Inc. v. Monroe Stores, Inc., No. 3293 Equity, which ancillary bill of complaint was filed on April 16, 1931, subsequently to the commencement of said Superior Court proceedings; that thereafter, to wit, on June 15, 1931, said Dempsey, Drake and Buff filed in said Superior Court proceedings a stipulation in writing whereby they waived their said motion to dismiss, a copy of which stipulation is hereto annexed marked "A."

5. That thereafter, to wit, on June 26, 1931, said Dempsey, Drake and Buff filed an answer to the merits in said Superior Court proceedings and that thereupon said cause was referred by said Superior Court to a master under a rule dated July 1, 1931, directing him to hear the parties and their evidence and to report the facts to said court;

that hearings on the merits of said Superior Court proceedings commenced before the master on or about July 7, 1931, and continued to about July 22, 1931; that said receiver attended as a witness for said Raphael the hearing [fol. 38] before the master held on July 7, 1931, and that Andrew J. Aldridge, Esquire, the attorney for said receiver, at the request of said Raphael attended before the master at a later date and testified as a witness for said Raphael in said proceedings.

6. That after the master had duly prepared his draft report and after a hearing thereon in accordance with the rule of said Superior Court, the master duly filed his report in said Superior Court on October 5, 1931, a copy of which report is hereto annexed marked "B"; that no objections or exceptions to said report were filed by any of the parties in said proceedings; that on or about said date, said Dempsey, Drake and Buff filed in said Superior Court proceedings a motion to recommit said master's report, a copy of which is hereto annexed marked "C," and a motion to amend their answer in said proceedings, a copy of which is hereto annexed marked "D"; that said motion to recommit and said motion to amend said answer were duly heard by said Superior Court; that on October 20, 1931, said Superior Court duly entered orders denying each of said motions, and also, on said date, duly entered an order upon the motion of said Raphael confirming said master's report; that no appeals have been taken from any of said orders entered on October 20, 1931, and that the time for appeal has now elapsed; that said cause is therefore ripe for the entry of a final decree in accordance with the findings of the master in said report as confirmed.

7. That on November 13, 1931, said Raphael duly filed in said Superior Court proceedings a motion for the entry of a final decree, and submitted for the consideration of said court a final decree calculated to reach and apply in said Superior Court proceedings such stock certificates, mortgages, real estate and bank deposits of said Drake and Buff as the master had found them to be possessed of upon the evidence adduced before him; that said motion for the entry of a final decree has been marked for hearing in said Superior Court on December 7, 1931.

8. That the master has found in his report that said Drake and Buff are possessed of shares of stock, real estate, mortgages and bank deposits as follows:
[fol. 39] That said Buff is the president and treasurer of the Henrici Laundry Machinery Company, and holds certificates of capital stock therein amounting in par value to one hundred and fifty thousand dollars ($150,000) (Master's Report, par. 21); that he is also president and treasurer of Babson-Dow Manufacturing Company and holds 140 shares first preferred stock, 40 shares second preferred stock and 523 shares common stock of that company (Master's Report, par. 22); that he is president and manager of the Buff & Buff Manufacturing Co. and holds "a large number of shares of the capital stock thereof" (Master's Report, par. 23).

That said Drake is the owner of 100 shares preferred stock of Mullins Manufacturing Company (Master's Report, par. 25); that he is the holder of unrecorded deeds conveying to him a large number of parcels of land which stand of record in the names of various nominees of said Drake (Master's Report, pars. 26 and 27); that said Drake holds various mortgages on real estate aggregating in amount approximately one hundred and fifty thousand dollars ($150,000) (Master's Report, par. 28); and that, at the date of the filing of the bill of complaint, said Drake had deposits in the Atlantic National Bank of Boston, Waltham Trust Company and in the First National Bank of Portsmouth, New Hampshire (Master's Report, par. 28).

9. That in said Superior Court proceedings said Raphael obtained and now has attachments upon property of said defendants Drake and Buff, and injunctions restraining the transfer by them of certain property to secure the payment of the amount justly due him, and that said Raphael has a legal right to reach and apply in said proceedings so much of said property covered by said attachments and injunctions as may be necessary to satisfy his said claim against said Drake and Buff; that the granting of the orders prayed for in the receiver's motion will deprive said Raphael of substantial rights, and will result in great and irreparable loss to him.

10. That said Raphael has done nothing to affect, in any way, his right to proceed with said Superior Court pro-

ceedings; that in reliance upon and in pursuance to the [fol. 40] order entered by this court on March 24, 1931, authorizing said Raphael to institute proceedings on said bond, said Raphael has expended large sums of money and much time and effort in instituting and prosecuting said Superior Court proceedings, and that it would be inequitable and unjust now to modify said decree of March 24, 1931.

11. That George B. Monroe, the receiver of said Monroe Stores, Inc., has no legal interest or standing to entitle him to any order or decree to halt or interfere with said Superior Court proceedings; that he is not a party to said proceedings, either individually or as receiver, that he has no interest in the claim of said Raphael, and is not entitled to be heard in reference to the prosecution by said Raphael of said Superior Court proceedings.

12. That said receiver in no way represents said Raphael in connection with any proceedings on said bond, and has at no time been authorized by said Raphael to bring any proceedings in his behalf; that on April 16, 1931, when said receiver filed in this court the ancillary bill of complaint referred to in his motion, said Superior Court proceedings had already been commenced and were pending; that said Raphael was not made a party to said ancillary bill of complaint, that he is not mentioned therein, that his claim is not referred to therein, and that he has never taken any part in any hearings thereon or in the contempt proceedings referred to in said motion.

13. That said Raphael is not a resident of the Commonwealth of Massachusetts but resides and has his usual place of business in New Britain, in the County of Hartford, in the State of Connecticut; that no personal service has been made upon said Raphael in these proceedings.

14. That said receiver having had knowledge of the entry by this court of said order of March 24, 1931, authorizing said Raphael to sue said Dempsey, Drake and Buff and of the institution and prosecution by said Raphael of said Superior Court proceedings in pursuance to said order, said receiver is barred on principles of laches and estoppel from now attempting to obtain a modification of said order.

15. That said Raphael is not interferring or attempting [fol. 41] to interfere in any way with said receivership; that he is only seeking to obtain payment of the amount justly due him from said Dempsey, Drake and Buff; that, on the contrary, the motion filed by the receiver is an attempt to interfere with the pursuit by said Raphael of his lawful remedies against said Dempsey, Drake and Buff; that said receiver has already disposed of all the property of Monroe Stores, Inc., which came into his hands, and that he has no right to attempt to shield Dempsey, Drake or Buff from being compelled to pay to said Raphael the amount justly due to him, as aforesaid; that said Drake and Buff are possessed of property of a value far in excess of the amount of their obligation to said Raphael and to the other creditors of said Monroe Stores, Inc., whose claims have been proved and allowed; that said Drake and Buff are therefore amply able forthwith to pay said obligation to said Raphael as they are in law bound to do, and that such payment to him will not interfere with the collection by any of said other creditors of the amounts due them.

Wherefore said Raphael files this plea upon the return of the order to show cause, and prays that said motion filed by said receiver be denied.

By His Attorneys, Mark M. Horblit, Benjamin Goldman.

Duly sworn to by Benjamin Goldman. Jurat omitted in printing.

[fol. 42] A

Commonwealth of Massachusetts,
Suffolk, ss:

Superior Court

In Equity. No. 37782

United States of America ex Rel.

v.

Harold A. Dempsey et al.

Stipulation

It is hereby stipulated and agreed that the "Motion to Dismiss" heretofore filed by the defendants Dempsey, Buff

and Drake be and the same hereby is waived; that an answer in behalf of the above named defendants be filed on or before June 22, 1931.

Mark M. Horblit, Attorney for Plaintiff. Ralph H. Robb, Attorney for Defendants.

B

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPERIOR COURT

No. 37782. Equity

UNITED STATES OF AMERICA on Relation of LOUIS RAPHAEL

v.

HAROLD A. DEMPSEY et al.

MASTER'S REPORT

Pursuant to an order of reference of the Superior Court, a bill of complaint of the United States of America, on relation of Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut, versus Harold A. Dempsey and Louis F. Buff, both of Boston, Massachusetts, Clifford S. Drake of Northampton, New Hampshire, having a usual place of business in said Boston, Laundry Machinery Co. and W. E. Noyes Co., both corporations organized under the laws of the Commonwealth of Massachusetts and both having a usual place of business in said Boston, was referred to me as Master to hear the parties and their evidence and report my findings to the Court with such facts and questions of law as either party may request.

[fol. 43] By virtue of the reference I heard the parties and their evidence and make report thereof to the Court as follows:

The plaintiff's bill of complaint alleges that:

Louis Raphael, relator, is a resident of New Britain, County of Hartford, State of Connecticut; the defendants, Harold A. Dempsey and Louis F. Buff, are residents of

Boston, County of Suffolk, Commonwealth of Massachusetts; the defendant, Clifford S. Drake, is a resident of Northampton, County of Rockingham, State of New Hampshire, and has a usual place of business in said Boston.

On July 14, 1930, a bill in equity was filed in the United States District Court for the District of Massachusetts by J. B. Hirshfield Co., Inc., against Monroe Stores, Inc., a Massachusetts corporation, praying for the appointment of a receiver of the Monroe Stores, Inc.

On July 23, 1930, the United States District Court for the District of Massachusetts appointed George M. Monroe of Quincy, Massachusetts, receiver.

On November 10, 1930, the receiver filed a petition for leave to sell the assets and property of the Monroe Stores, Inc., which petition was duly allowed on November 12, 1930, and thereafter the Court received a bid, submitted in writing by Harold F. Dempsey, defendant, whereby the said Dempsey offered, as a consideration of the sale of the assets to him by the receiver, to pay all the creditors of the Monroe Stores, Inc., a sum equal to thirty (30) per cent of their respective claims in or within thirty (30) days after their claims had been proved and allowed, and as a part of said bid offered to file with the said Court a bond with good and sufficient sureties in the penal sum of one hundred thousand ($100,000) dollars, the condition of said bond being that if said Dempsey performed the obligations of the bid, the bond was to be null and void, otherwise the bond was to remain in full force and effect, the sureties thereon to be held liable.

On November 26, 1930, a decree was entered by the Court ordering the receiver to accept the offer of the said Dempsey and to execute a bill of sale of all of the assets of the Monroe Stores, Inc., to him, pending the filing by the said Dempsey of a bond in the penal sum of one hundred thou- [fol. 44] sand ($100,000) dollars with good and sufficient sureties.

On December 2, 1930, the said Dempsey did file in Court a bond in the penal sum of one hundred thousand ($100,000) dollars and by the terms of said bond said Dempsey was principal and the defendants, Louis F. Buff and Clifford S. Drake, were sureties, binding themselves in the full and just sum of one hundred thousand ($100,000) dollars to cover the performance by the said Dempsey of all

the conditions set forth in the offer, whereupon the receiver executed unto the said Dempsey a bill of sale conveying to him all the assets of the Monroe Stores, Inc.

On August 18, 1930, the United States Court issued an order requiring all persons having claims against the Monroe Stores, Inc., to present their proofs of claims to the receiver for allowance on or before September 30, 1930, which time fixed for the allowance of claims was extended to November 15, 1930.

On September 25, 1930, the plaintiff presented to the receiver a proof of claim, and on February 9, 1931, the claim was proved and allowed in the sum of thirty-five thousand ($35,000) dollars, and the defendants, through their counsel, assented in writing to the allowance of said claim; the plaintiff was thereupon entitled to receive from the said Dempsey within thirty (30) days the sum of ten thousand five hundred ($10,500) dollars, being (30%) per cent of the amount in which the claim was allowed, namely thirty-five thousand ($35,000) dollars, and the plaintiff made demand on March 12, 1931, for the payment of same, and received the sum of twelve hundred ($1,200) dollars, leaving a balance due him of ninety-three hundred ($9,300) dollars with interest from March 12, 1931.

The defendant Buff is the owner of capital stock of the Laundry Machinery Co.

The defendant Drake is the owner of stock in a number of corporations unknown to the plaintiff.

The said Dempsey sold and transferred the assets received by him from the Monroe Stores, Inc., to a new corporation known as W. E. Noyes Co. in consideration of issu-[fol. 45] ing to the said Dempsey or his nominee certificate of shares of the capital stock of the W. E. Noyes Co. A portion of the said stock was issued to the defendants Drake and Buff.

The plaintiff seeks to reach and apply the stock of the defendants in the W. E. Noyes Co.

The plaintiff received a commission by virtue of an order entered by the United States authorizing him to institute and prosecute these proceedings on the bond in the name of the United States of America.

During the trial before the Master, the plaintiff moved to amend his bill of complaint, alleging that Louis Buff, defendant, was the owner of stock in the Babson Dow

Machinery Co. and Buff and Buff Manufacturing Co., both Massachusetts corporations, setting forth in his amendment that the defendants Buff and Dempsey, in consideration of the conveyance to the said W. E. Noyes Co. received an indemnity agreement from the said W. E. Noyes Co. for the payment to them for any liability or loss or damage on their bond.

The plaintiff further alleged in said amendment that said Dempsey was indemnified by the W. E. Noyes Co. from any loss that he sustained, and further that the defendant Drake held property in the names of various straws, which property belonged to the said Drake and that said straws had no beneficial interest in the property.

The plaintiff further prays that all of the properties set forth in the amended bill of complaint be reached and applied in satisfaction of the indebtedness.

Defendants' Answer

The defendants plead ignorance as to the allegations contained in paragraph 1 of the plaintiff's bill of complaint as to the residence of the plaintiff.

The defendants admit the allegations contained in paragraph 2, stating that the defendants Dempsey and Buff are residents of Boston, and the defendant Drake a resident of Northampton, New Hampshire.

[fol. 46] The defendants plead ignorance as to the allegations contained in paragraph 3 relative to the filing of the bill in equity in the United States Court against the Monroe Stores, Inc. and the appointment of a receiver.

The defendants admit the allegations contained in paragraph 4 relative to the petition for leave to sell the assets and the allowance of same. The receipt of sealed bids for the property and the bid of the defendant Dempsey, and the offer of thirty (30%) per cent to be paid to creditors, and the giving of the bond in the sum of one hundred thousand ($100,000) dollars.

The defendants neither admit nor deny the allegations contained in paragraph 5 relative to the acceptance of a bid by the Court and the giving of a bond in the sum of one hundred thousand ($100,000) dollars.

The defendants admit the allegations contained in paragraph 6 relative to the giving of a bond in the sum of one

hundred thousand ($100,000) dollars with the said Dempsey as principal and the defendants Buff and Drake as sureties for the full performance of the conditions of the offer, the approving of said bond by the Court and the execution and delivery by the receiver of a bill of sale to the said Dempsey.

The defendants plead ignorance as to the allegations contained in paragraph 7 relative to the filing of claims under order of the Court on or before September 30, 1930, which time was extended to November 15, 1930, and the presenting of a claim by the plaintiff to the receiver which was allowed in the sum of thirty-five thousand ($35,000) dollars, to which all parties assented, and on which the plaintiff was entitled to receive within thirty (30) days the sum of ten thousand five hundred ($10,500) dollars, thirty (30%) per cent of the amount in which the plaintiff's claim was allowed, payment of the sum of twelve hundred ($1,200) dollars to the plaintiff, leaving a balance due of ninety-three hundred ($9,300) dollars with interest from March 12, 1931.

The defendant Louis F. Buff denies the allegation contained in paragraph 8 that he was the owner of any stock in the Laundry Machinery Co.

[fol. 47] The defendant Clifford S. Drake denies the allegation contained in paragraph 9 that he was the owner of stock in various corporations unknown to your plaintiff.

The defendants deny allegations contained in paragraph 10, stating that the defendant Dempsey owns no shares of stock of the W. E. Noyes Co., and that the defendants Buff and Drake are not owners of any stock of the W. E. Noyes Co.

The defendants deny allegations contained in paragraph 11 relative to the plaintiff suffering irreparable damage.

The defendants are ignorant of the allegations contained in paragraph 12 relative to the permission of the plaintiff to institute and prosecute proceedings.

I find the following facts:

1. On March 24, 1931, the plaintiff called the relator, filed in the United States District Court for the District of Massachusetts, a petition for leave to institute and prosecute proceedings in the name of the United States of America upon a bond given by the defendant Dempsey, as

principal, and the defendants Buff and Drake as sureties, being bond in issue in this action, a copy of which is hereto annexed marked "Exhibit C", and a decree authorizing such proceedings was duly entered by said United States District Court on said date.

2. On July 14, 1930, a bill in equity was filed in the United States District Court by creditors against the Monroe Stores, Inc., a Massachusetts corporation, praying for the appointment of a receiver of Monroe Stores, Inc.

3. On July 23, 1930, said Court appointed George B. Monroe of Quincy as receiver of the assets and property of said Monroe Stores, Inc.

4. On August 18, 1930, said Court issued an order, fixing September 30, 1930, as the date on or before which proofs of claim against said Monroe Stores, Inc., were to be presented to the receiver for allowance. The date fixed in said order was later extended to November 15, 1930.

5. On September 25, 1930, the plaintiff duly presented his proof of claim to the receiver, and on February 9, 1931, [fol. 48] said proof of claim was duly allowed in the sum of thirty-five thousand ($35,000) dollars, the individual defendants, by their counsel, assenting to such allowance.

6. Early in November, 1930, said receiver filed in said Court a petition for leave to sell all the assets and property of said Monroe Stores, Inc., which petition was duly allowed on November 12, 1930; thereafter, said receiver duly advertised for bids and on November 26, 1930, the bids received by the receiver were submitted and considered in open Court.

7. The defendant, Harold A. Dempsey, made a bid for the property of Monroe Stores, Inc., wherein he offered to pay creditors of said Monroe Stores, Inc., thirty (30%) per cent of their respective claims in or within thirty days after the same were filed and allowed, and offered to file a bond in the penal sum of one hundred thousand ($100,000) dollars with sureties to secure the performance of the terms and conditions of his bid. A copy of said bid is hereto annexed marked "Exhibit A", and a copy of the order thereon is hereto annexed marked "Exhibit B".

8. On November 26, 1930, the United States District Court for the District of Massachusetts entered a decree wherein the receiver was directed to accept the bid submitted by the said Dempsey and authorized the receiver to transfer the assets of the said Monroe Stores, Inc., upon the filing and approval of the bond.

9. The defendant Dempsey was merely a straw and nominee for the defendants Buff and Drake, and had no financial interest other than he was acting for them to purchase the property.

10. On December 2, 1930, the said Dempsey filed in the United States District Court for the District of Massachusetts, a bond in the penal sum of one hundred thousand ($100,000) dollars wherein the sureties named are Louis F. Buff and Clifford S. Drake. Said bond was signed, executed and delivered by the said Buff and Drake who qualified before one of the clerks of the United States Court as to the property they owned. The said Buff and Drake swore to statements of ownership of property as set forth in said bond. A copy of said bond, and statements of [fol. 49] qualifications of said Buff and Drake are hereto annexed marked "Exhibits C, D and E", respectively.

11. Upon the approval of said bond on said date by the Court the receiver transferred all of the assets of the Monroe Stores, Inc., to the said Dempsey.

12. On February 9, 1931, all of the claims presented to the receiver for allowance were allowed or disallowed with the consent and approval of the defendants, Dempsey, Drake and Buff.

13. The said Dempsey acted at the request of the said Buff and Drake as their agent, and acquired the property of Monroe Stores, Inc., at their request.

14. The defendant Dempsey received from the defendants Drake and Buff a bond dated December 2, 1930, in the penal sum of one hundred thousand ($100,000) dollars by the terms of which he was indemnified against any liability or loss as the result of the offer, and on the bond which the said Dempsey signed as principal in the United States District Court.

15. In addition to the bond filed by the said Dempsey, the sum of twenty thousand ($20,000) dollars was deposited as a part of the purchase price with the receiver, which monies were furnished by the defendants Buff and Drake in equal shares.

16. After the delivery of the assets of the Monroe Stores, Inc., the defendants Buff and Drake, through their counsel Thomas W. Morris, Esq., organized a Delaware corporation known as the Monroe Stores Corporation, and the said Dempsey, at the direction of Buff and Drake, assigned and transferred all of the assets of the Monroe Stores, Inc., to the Monroe Stores Corporation.

17. The said Monroe Stores Corporation was authorized to issue preferred stock Class A and B, the latter being a voting stock, for the transfer to it of all the assets purchased by the said Dempsey from the receiver of the Monroe Stores, Inc.

18. There was issued to the said Dempsey for the property one thousand (1000) shares of Class B stock and two (2) promissory notes for twenty-five thousand ($25,000) dollars each, in which Dempsey was named as payee. In addition, the Monroe Stores Corporation gave unto the said Dempsey an agreement to save him harmless from all obli- [fol. 50] gations of the offer made for the purchase of the Monroe Stores, Inc., property and his being principal on the bond, and a similar agreement was given by the said corporation to the defendants Buff and Drake.

19. Upon receipt of the promissory notes the said Dempsey endorsed and delivered the same to Buff and Drake. Later on one thousand (1,000) shares of Class B stock was surrendered, and other shares were issued as follows:

Ida M. Hodsdon, nominee of Drake	25 shares
Louis F. Buff	125 "
Clifford S. Drake	125 "
Priscilla French, stenographer in employ of Morris & Robb, Esqs.	150 "
Thomas W. Morris, Esq.	116 2/3

At the time of the filing of the bill in equity the said defendants Buff and Drake still held the certificates of said stock.

20. The defendants Buff and Drake and attorneys Robb and Morris are the only officers of the Monroe Stores Corporation, which corporation changed its name to W. E. Noyes Co. on December 31, 1930. The defendants Drake and Buff and attorneys Robb and Morris constitute the Board of Directors of the W. E. Noyes Co.

21. On December 2, 1930, the said Buff was and he is still the president and treasurer of the Henrici Laundry Machinery Co., a Massachusetts corporation having a usual place of business at 61 West Selden Street, Mattapan, and that the defendant Buff owns and holds certificates standing of record in his own name for shares of stock in par value the sum of one hundred fifty thousand ($150,000) dollars in the said company.

22. The defendant Buff is also president and treasurer of the Babson Dow Manufacturing Co., a Massachusetts corporation having a usual place of business at 60 Fulda Street, Roxbury, and he owns and holds certificates standing of record in his own name for 140 shares of the first preferred stock, 40 shares of the second preferred stock and 523 shares of common stock in the said company.

[fol. 51] 23. The defendant Buff is president of the Buff & Buff Manufacturing Co., a Massachusetts corporation having a usual place of business at 329 Lamartine St., Jamaica Plain, and he is manager of said corporation and holds a large number of shares of the capital stock thereof.

24. It was agreed by counsel for the defendants that the said Buff would appear for examination, and said counsel made a statement in open Court that he had requested Buff to testify but he had refused to submit to an examination. Plaintiff attempted to subpoena the said Buff but he was unable to get service on him.

25. The defendant Drake owns one hundred (100) shares of prefered stock of the Mullins Mfg. Co., a foreign corporation having a usual place of business in Salem, Ohio, and he still owns the shares of Class B stock issued to him and his nominees by the W. E. Noyes Co.

26. The defendant Drake has been and is engaged in the real estate business, particularly in buying tax titles, and he owns various parcels of real estate acquired through tax

titles in the counties of Suffolk, Middlesex, Norfolk and Essex, which parcels stand in the names of nominees of the said Drake who have paid no consideration therefor and hold record title for his benefit. The names of some of the nominees in whose names properties are held for the benefit for the said Drake are:

Ida M. Hodsdon, Ossippee Center, New Hampshire.
Harriet K. Evans, Wellesley, Massachusetts.
Reginald G. Hodsdon, Rutland, Vermont.
Louise C. Casselman, otherwise known as Louise C. Kitendaugh, Cleveland, Ohio.
Esther M. Dolan, Medford, Massachusetts.
Charlotte M. Hodsdon, Ossippee Center, New Hampshire.

27. The defendant Drake holds in his possession unrecorded deeds from the respective nominees to himself as grantee of property as shown by schedule hereto annexed marked "Exhibit F". There are no mortgages on any of the parcels, except the last four parcels set forth in the schedule.

28. The defendant Drake had on the date of the filing of [fol. 52] the bill of complaint and still has deposits of moneys to his personal credit in the Atlantic National Bank of Boston, Waltham Trust Co. of Waltham, Mass., and the First National Bank of Portsmouth, New Hampshire, and he has various mortgages on real estate aggregating in the amount of approximately one hundred fifty thousand ($150,000) dollars.

29. On March 12, 1931, the plaintiff, through his counsel, demanded from said defendants payment of ten thousand five hundred ($10,500) dollars on the amount of his claim of thirty-five thousand ($35,000) dollars, and the defendants Buff and Drake shortly thereafter paid to the plaintiff twelve hundred ($1,200) dollars on account of said dividend, leaving a balance of ninety-three hundred ($9,300) dollars due to the plaintiff from the said Buff and Drake.

30. The defendants, Buff, Drake and Dempsey, owe the said plaintiff the sum of ninety-three hundred ($9,300.00) dollars with interest from March 12, 1931.

31. The defendant Drake testified that the only reason he had for not paying the balance due the plaintiff was be-

cause he has an agreement from the Monroe Stores Corporation to save him harmless.

Respectfully submitted.

—— ——, Master.

C

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPERIOR COURT

In Equity. No. 37782

UNITED STATES OF AMERICA ON RELATION OF LOUIS RAPHAEL, of New Britain, in the County of Hartford, in the State of Connecticut, Plaintiff,

v.

HAROLD A. DEMPSEY, of Boston, in the County of Suffolk, in the District of Massachusetts; Louis F. Buff, of said Boston, and Clifford S. Drake, of Northampton, in the County of Rockingham, in the State of New Hampshire, Having His Usual Place of Business in said Boston, Defendants

DEFENDANTS' MOTION TO RECOMMIT CASE TO MASTER

Now come the defendants in the above-entitled action and [fol. 53] move that this case be recommitted to the Master on the ground that a Motion of the defendants to dismiss the case is on file and that said Motion is still pending.

By Their Attorney, —— ——.

D

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPERIOR COURT

In Equity

UNITED STATES OF AMERICA ON RELATION OF LOUIS RAPHAEL, of New Britain, in the County of Hartford, in the State of Connecticut, Plaintiff,

v.

HAROLD A. DEMPSEY, of Boston, in the County of Suffolk, in the District of Massachusetts; Louis F. Buff, of said Bos-

ton, and Clifford S. Drake, of Northampton, in the County of Rockingham, in the State of New Hampshire, Having His Usual Place of Business in said Boston, and Laundry Machinery Company and W. E. Noyes Co., Both Corporations Organized under the Laws of Massachusetts and Both Having a Usual Place of Business in Boston, in the County of Suffolk, in Said Commonwealth, Defendants

MOTION TO AMEND DEFENDANTS' ANSWERS

Now come the defendants and move that they may be allowed to amend their answers filed in the above entitled case as follows:

13. And further answering these defendants say that on or about April 16th, 1931 the Receiver for the Monroe Stores, Inc. filed in the District Court of the United States for the District of Massachusetts in re J. B. Hirshfeld & Co. Inc. v. The Monroe Stores Inc. in Equity #3293 an ancillary bill of complaint in which it was set forth that the defendants in this action had failed to pay among other things the amount claimed in this suit as set forth in the bill of complaint in this action. Thereupon on or about the 16th day of July, 1931 a decree was entered in the said District Court of the United States upon said ancillary bill of complaint rendering judgment against the defendants in this action for the benefit, among others, of this plaintiff Louis Raphael in the [fol. 54] sum of Thirty-three thousand twenty-six dollars and eighty-three cents, ($33,026.83) which sum includes the amount due in this suit and execution has issued therefor.

14. Wherefore these defendants say that this bill of complaint should be dismissed against them as the matter has become res adjudicata.

By Their Attorney, —— ——.

On the said third day of December, said cause comes on to be heard on the aforementioned plea of Louis Raphael, the Honorable James A. Lowell, Circuit Judge, sitting.

In United States District Court

Stenographic Transcript of Hearing on Motion to Modify Order Entered March 23, 1931

Before Lowell, J.

Appearances:

Andrew J. Aldridge, Esq., Counsel for Receiver;
Mark M. Horblit, Esq., representing Louis Raphael;
Ralph H. Robb, Esq., representing Louis F. Buff and Clifford S. Drake;
T. H. Stearns, Esq., representing Clifford S. Drake.

Federal Building,
Boston, Mass., December 3, 1931—10 A. M.

Mr. Aldridge: If the court please, this motion that I have before the court this morning is to modify the order entered by this court on March 23, permitting Louis Raphael, one of the creditors of the Monroe Stores, to bring suit in the Superior Court, Commonwealth of Massachusetts. At the time that that order was issued no suit on behalf of the creditors of the corporation was pending in this court. Later a suit was brought and judgment was entered for $33,026.89, being the balance due the creditors of The Monroe Stores, Inc. $9,300 of that amount represents a claim of Louis Raphael, being the balance due him. He proved his claim for $35,000, and by agreement of counsel representing the receiver and Mr. Raphael he was to have—in other words, his claim was for the principal amount of $10,500. He was paid $1,200 on that and the balance is now due him and has been due for some time. The position that counsel for the [fol. 55] receiver takes in this question is this——

The Court: I have forgotten what has been done in the State court.

Mr. Aldridge: The master's report has been confirmed by the court and it is now up on motion for entering a final decree. My objection is to the final decree because it provides that after 30 days after the entry of that decree unless the full amount of $9,300 is paid with interest and costs, that the two defendants Buff and Drake turn over all of their property to a special master to be appointed by that court.

Now, Mr. Horblit is entitled to his money without question, but the other creditors are also entitled to their money. On October 19, I cited Mr. Buff and Mr. Drake in for contempt of court for failure to carry out their agreement, and upon their agreeing to pay $1,000 per month they were not held in contempt, but the court held the petition for further orders of the court unless they did comply with that order. Now, they have paid two payments required under that, and there is in the possession of the counsel for the receiver approximately $3,400. They were at the same time ordered to transfer a claim that they had against the Noyes Company for approximately $33,000. That claim was contested on the ground it was merely a special contract that they had and not an agreement to save them harmless; also that the Noyes company was entitled to credits against the claim.

I succeeded in having a conference with Mr. Hannify, who represents the trustee in bankruptcy on that case, and I have agreed on $12,500 in proof of that claim if he would recommend that amount. It has not been approved by the referee yet. That will amount to approximately $4,000, which will give us approximately $7,000 to be credited against the judgment. They have approximately two or three thousand dollars worth of claims to be applied against the judgment.

The situation as I see it is this: If the court permits the entry of the decree in the Superior Court it will handicap this court in the administration of the receivership estate [fol. 56] because we will have nothing to go against in order to enforce the decree of this court as to the payment of the money, except put him in jail. I would rather have the money than put him in jail. That is my entire position in this case.

The Court: The only thing is, have you brought that matter to the attention of the State court?

Mr. Aldridge: I tried to. The court put us over and then I brought this petition and advised the court up there that a temporary restraining order had been issued and order of notice issued by this court. That case comes up again Monday after the hearing on this petition.

The Court: Well, supposing I wanted to grant an order?

Mr. Aldridge: The order would be this, it would be against the plaintiff Raphael and his counsel, enjoining

them from proceeding further in that case except to reduce their claim to judgment. I think they are entitled to that.

The Court: Then I shouldn't be interfering——

Mr. Aldridge: With the process of that court at all.

The Court: All right.

Mr. Robb: If your Honor please, I appear for Mr. Drake, one of the defendants, or our office does. We did call this matter to the attention of the State court and in a motion to reopen the master's report, that is, to have it recommitted to him, setting out that the $9,300 which was found by the master as due Raphael from Buff and Drake was included in this judgment of $33,000 in the United States District Court. The position of the State court seemed to be that it is all right since the master had found that $9,300 was due in the State court, but he said this: "I am aware that I do not have to pass on the final decree when it comes up, as to what they will do with it. That is for another court."

Now, we have also filed another motion setting out the facts, that this suit started in the United States District Court, that a judgment has been obtained here, including the amount which is found due Raphael in the State court and asking that the decree confirming the master's report be vacated and that the master's report be recommitted to show the facts that there is a judgment in the United States [fol. 57] District Court and that an execution has issued and that a demand has been made, and also show the further facts that they were cited into contempt and they are paying the judgment in which Raphael's claim is included in the United States District Court to the receiver of The Monroe Stores appointed by the United States District Court. That is in the records of the State court.

The Court: Well, has that motion been acted on by the State court?

Mr. Robb: The motion came up last Monday and at that time this temporary order was out. It came to the court's attention and Mr. Horblit's attention and the case went over until next Monday, but it has been called to their attention, however.

Mr. Horblit: May it please your Honor, I have filed here a plea setting forth the facts with respect to the proceedings in this case. I would like to call to your Honor's attention the following situation:

On February 9, 1931, the claim of Raphael was allowed, as Mr. Aldridge has said, in the sum of $35,000, and there was thereupon due him within 30 days thereafter under the provision of the bond $10,500, being 30 percent, as your Honor will recall, that these sureties on the bond agreed to pay. Now, they paid $1,200 and they have to pay the rest. We thereupon came before your Honor with a petition setting forth the facts and asked for leave to institute proceedings on the bond and your Honor entered an order to that effect on March 24, 1931.

Now, acting under this order and in pursuance thereto Raphael brought the proceedings in the Superior Court and has expended a great deal of effort and time and money in prosecuting those proceedings. We had long hearings before a master. At those hearings before the master the receiver that was appointed by this court was called by me to testify as a witness, and he attended the hearing before the master that was held on July 7, 1931. Mr. Aldridge, the receiver's counsel, was called by me as a witness before the master and he testified. Nothing was said at any time during this whole period about any modification of that order and we went on relying upon the order that this court has [fol. 58] given us, and finally after many hearings have obtained a confirmation of the master's report. That is annexed to the paper which I have filed, and I call to your Honor's attention that the master's report recites—and I have summarized his recital in paragraph 8, which is on page 4 of the paper which your Honor has before you—that these defendants Buff and Drake have showed that they have very substantial sums of money. I call to your Honor's attention that Buff is found to have been treasurer and president of the Henrici Laundry Machine Company and has stock there amounting to $150,000, and is president and treasurer of the Babson-Dow Manufacturing Company and holds second preferred stock and common stock of that company, and that he also holds a large number of shares of stock of Buff & Buff Manufacturing Company.

Now, he has found as to Drake that he holds $150,000 of mortgages, that he owns a large number of parcels of land.

The Court: I guess those gentlemen showed they were too rich.

Mr. Horblit: Well, your Honor, Drake testified before the master and these are findings that were based on the

testimony before the master; so that it appears affirmatively, your Honor, that they have a substantial amount of property, much more than is sufficient to pay the claim of Raphael and the claims of all the other creditors.

Now, I would like to urge upon your Honor whether or not it is equitable or fair at this time, after Raphael has gone to this expense of these hearings under an order of this court, for the receiver to come in here and say that the order should be modified. All we are seeking to do is to recover from these defendants the amount which this court has said and which the Superior court has said is justly due to Raphael.

The Court: Supposing you did recover, what will you get in the way of costs, and so forth?

Mr. Horblit: In the way of costs?

The Court: Yes.

Mr. Horblit: From the Superior Court?

The Court: Yes.

[fol. 59] Mr. Horblit: Mr. Aldridge says about $360 interest. For a rough guess on cost, your Honor, we say $100, I think, would be what it would bring.

The Court: If I grant this order what you would lose would be $460?

Mr. Horblit: Something like that, and we will also lose this, your Honor: We have attachments in the State court. Now, those attachments expire 30 days after the judgment.

The Court: Has judgment been entered?

Mr. Horblit: No, your Honor, but it will be because the master's report is confirmed. It is right for a final decree.

Now, I want to call also to your Honor's attention that the suit was commenced here by the receiver after your Honor had granted Raphael the right to sue and suit had been commenced. In other words, they are asking the court to do something that is most unusual, and I am quite certain that they cannot find a single authority to support them, namely, that where a court has given leave to sue and where the suit has gone on in pursuance of an order of this court, under leave of this court, that such condition can be changed. They are now asking the court to modify the order; that is, after the plaintiff, Raphael, has changed his position and has gone ahead with the suit and has obtained attachments; asking him to lose all those attachments, al-

though what he has done has been in pursuance of an order of this court. I have searched the books.

The Court: Not in pursuance of an order; in pursuance of a permission.

Mr. Horblit: I mean in pursuance of leave of this court to sue. He didn't take it upon himself to bring the suit without leave of this court. He came in here first on this petition, which we filed here and obtained the leave, and has gone ahead accordingly. It seems to me, your Honor, that the persons that are really interested in having this motion allowed are the defendants Drake and Buff, who do not want to pay as they should pay out of the property which they hold.

The Court: Tell me, Mr. Horblit, how are you preju-
[fol. 60] diced? Tell me in dollars and cents, or in any way you want, if I grant the injunction how will it affect you.

Mr. Horblit: If your Honor please, in reply to your question I will say this first: I call to your Honor's attention the attachments that we have, which attachments we are losing if this court should grant the order. Secondly, we will have to wait a great deal of time before we can get the money in pursuance to the order of this court, because, as I understand it, there have been some orders made here although we had no notice and no chance to be heard. I understand that Mr. Buff has never been examined by this court, and he refused to appear as a witness in the other proceedings. We will have to wait a great deal of time in order to collect the money, whereas we could, as we believe, collect it immediately from Buff.

Furthermore, there is the interest. As I understand it, Mr. Aldridge took a list of the allowed claims that have not been paid and computed 30 per cent of those claims and had the order here allowed for the amount of that 30 per cent without computing interest. Now, under the order of this court, as I have been recently informed, they are not to pay more than a thousand dollars a month. That would take nearly three years to pay. Now, Raphael will sustain substantial loss during that time; the interest will amount to considerable, and he could get his money immediately in the other court. In other words, your Honor, what we are doing is not anything except to compel the sureties on the bond,—who have certainly dealt fast and loose with the receiver in the past in connection with the obtaining of

property and filing of a bond, and then not paying creditors as they had agreed to do but compelling them to bring suit,—to pay us what is due. I submit these parties should not be protected from judgments, which Raphael is justly entitled to, because of their claim,—and I say it is their claim because they are here represented by counsel,—that would interfere with their payments, when it appears that the findings of the master's report were confirmed and there were no objections or exceptions filed to the master's report by either Drake or Buff. They raised no objection [fol. 61] to the finding, so that the findings in the master's report which I have cited in the plea which I filed, have been confirmed without any objection on the part of Drake or Buff. They show affirmatively that Drake and Buff are well able to pay the amount of money that is due.

Now, we say furthermore, your Honor, that it is not fair at this time, after all this litigation and after the expense to which Raphael has been put, the receiver and Drake having known of all this, to say now that Raphael can't get the fruits of his litigation. I submit, your Honor, that to change the position at this time would be inequitable. We say further that so far as Raphael is concerned that the amount of money which Buff will have to pay at this time will not interfere with the payments ordered by this court of a thousand dollars a month; that he is reputed to be a man who is worth several hundred thousand dollars. Why, your Honor, when they obtained the bond they filed a statement showing that they are worth a great deal of money, and it was on that basis that they were qualified as sureties on the bond.

Now, should these sureties be protected against a just claim, and the plaintiff Raphael, who acted in pursuance to the leave granted by this court, be prejudiced on that account? I submit, your Honor, that Raphael is entitled, having acted under the leave of this court to proceed with his case, and that these sureties on the bond should not be protected or aided by any modification of the order at this time.

The Court: Could an arrangement like this be made, Mr. Aldridge, that Raphael, when paid, should be paid the amount which he would now recover plus interest?

Mr. Aldridge: I asked Mr. Robb that question, would Mr. Buff and Mr. Drake agree to pay Raphael the three hundred

and some odd dollars interest plus his court cost in the Superior Court, and they both said they would.

The Court: Well, then, he ought also to have——

Mr. Aldridge: My answer carries interest——

The Court: From the date of entry.

Mr. Aldridge: They said they would be. There are one or two things that I wanted to clear up. Mr. Horblit called [fol. 62] the court's attention to the fact that I testified in this case. I did testify in that case as Mr. Horblit's witness. I also called the master's attention to the fact that I had a case pending in this court in behalf of some claims and I exhibited to the master in that case an agreement between counsel for the receiver and counsel representing the defendants that they would give me a judgment as soon as they could compute the amount of it, and that judgment, according to that agreement, was entered on the tenth day of July this year.

Now, there is one other thing. The attachments will not be lost because your Honor will recall you issued a very stringent injunction in this case preventing these gentlemen from in any way disposing of that property. That injuction still stands today. That injunction was issued at the time of the filing of the ancillary bill of complaint in this case. Nothing could be done, this court having original jurisdiction in the matter. No one could move on that. As a matter of fact I don't think the sheriff of Suffolk County could touch any of this property without being in contempt of court, with that injunction still standing.

The Court: What do you ask me now to do?

Mr. Aldridge: I ask you to issue an injunction against further proceedings in the State court, allowing Mr. Horblit to reduce his claim to a judgment in the State court but proceeding no further.

The Court: Do you want to say any more, Mr. Horblit?

Mr. Horblit: If your Honor please, I would like to call to your Honor's attention some other things that I neglected to say in my first remarks, that is this: The defendants in the Superior Court case, Drake and Buff, filed a motion to recommit the master's report, which was heard and denied, and I have annexed a copy of the motion to the plea which I filed before your Honor. That was denied on October 20, 1931, and no appeal has been taken from that.

Now, they also filed a motion setting forth the pendency

of the ancillary bill of the receiver against them in this court. The court denied that motion for this reason, that Raphael was not a party to those proceedings and therefore could not be bound by those proceedings or prohibited [fol. 63] or interfered with by them, not having been heard on them, receiving no notice and having had no opportunity to be heard either in those proceedings or in the contempt proceedings. In other words, what they are attempting to do is to estop a party from proceeding with his suit by reason of another suit to which he is not a party.

The Court: Well, you are not a party in a way and in a way you are. This includes your claim as much as anybody else's claim.

Mr. Horblit: Raphael is not mentioned in the ancillary bill, and your Honor will recall, as I stated before, that the ancillary bill was commenced after his proceedings, not before.

The Court: I understand that. What is your exact motion, Mr. Aldridge?

Mr. Aldridge: That further proceedings in the State court be enjoined.

The Court: All right. The motion is granted.

Mr. Horblit: Your Honor, may my rights be saved?

The Court: Surely.

[Adjourned.]

Approved for printing.

A. J. Aldridge, Attorney for George B. Monroe, Receiver. Mark M. Horblit, Benjamin Goldman, Attorneys for Louis Raphael, Appellant.

IN UNITED STATES DISTRICT COURT

ORDER FOR INJUNCTION, ETC.—December 7, 1931

LOWELL, J.:

This cause came on to be heard at this sitting, upon the receiver's motion and upon the plea filed thereto, was argued by counsel and thereupon, upon consideration thereof, it was ordered that the order dated March 23, 1931, [fol. 64] whereby Louis Raphael was permitted to sue Har-

old A. Dempsey, principal, Louis F. Buff and Clifford S. Drake, sureties on the bond filed by said Harold A. Dempsey in this cause, be and the same is hereby modified, the said Louis Raphael is hereby enjoined and restrained from further prosecuting his suit in the Superior Court of Suffolk County, Commonwealth of Massachusetts, being equity No. 37782, except that the said Louis Raphael may proceed in said cause to judgment, but no further.

It is further ordered that the said Louis F. Buff, Harold A. Dempsey and Clifford S. Drake pay to Louis Raphael the sum of $390.60 interest and his costs amounting to $171.10.

By the Court.

John E. Gilman, Jr., Deputy Clerk

December 7, 1931.

J. A. L., D. J.

From the foregoing order Louis Raphael claims an appeal to the United States Circuit Court of Appeals for the First Circuit and gives good and sufficient security that he will prosecute his plea to effect, and said appeal is allowed accordingly.

IN UNITED STATES DISTRICT COURT

PETITION OF LOUIS RAPHAEL FOR APPEAL—Filed December 28, 1931

To the Honorable James A. Lowell, Judge of the United States District Court for the District of Massachusetts:

The petition of Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut, respectfully shows that on November 27, 1931, George B. Monroe filed in the above-entitled cause a paper entitled "Motion to amend order allowing Louis Raphael to bring suit in the Superior Court for the County of Suffolk against Louis F. Buff, Clifford S. Drake and Harold A. Dempsey"; that an order of notice was issued thereon by this court directed to said Louis Raphael, returnable on December 3, 1931; that upon the return date of said order of notice, said Raphael appeared specially by counsel and duly filed in

[fol. 65] this court a plea to said "motion"; that thereafter, upon reading said motion and plea and hearing arguments of counsel thereon, the court did, on December 7, 1931, enter an order on said motion.

That your petitioner, feeling aggrieved by said order does hereby appeal therefrom to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of errors filed herewith and respectfully prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

Louis Raphael, by His Attorneys, Mark M. Horblit, Benjamin Goldman.

Duly sworn to by Mark M. Horblit. Jurat omitted in printing.

December 28, 1931.—Appeal allowed.

J. A. L., D. J.

In United States District Court

Assignment of Errors—Filed December 28, 1931

Now comes Louis Raphael, the appellant named in the foregoing petition for appeal, and respectfully assigns the following errors as grounds for his appeal from the order dated December 7, 1931:

1. That the court erred in assuming jurisdiction over the appellant.

2. That the appellant being a resident of another State and being a litigant in another court, the District Court had [fol. 66] no jurisdiction to enjoin the appellant with respect to the proceedings in such other court.

3. That there was no such services of process upon the appellant as to warrant the issuance of the injunction against him.

4. That the motion on which the order was issued was not a sufficient or proper proceeding to warrant the issuance of said order.

5. That George B. Monroe, as receiver, had no legal or equitable interest in the State court proceedings referred to in said order and no standing to entitle him to an injunction against the appellant.

6. That there was error in failing to apply the equitable principles of laches and estoppel against the application made by the receiver in said motion.

7. That it was inequitable to enjoin the appellant from proceeding with the State court proceedings referred to in the order.

8. That the order was not warranted in the absence of evidence to support the application therefor.

9. That the order interferes with the lawful prosecution by the appellant of the State court proceedings and thus deprives him of valuable rights.

10. That it was inequitable to modify the order of March 23, 1931, after the appellant had in good faith instituted and prosecuted the State court proceedings under the authority thereof.

11. That said order is erroneous in that it interferes with the appellant's legal and constitutional right to prosecute the State court proceedings therein referred to.

12. That said order was not warranted by the record and was contrary to law.

(Seal United States Circuit Court of Appeals, First Circuit.)

Louis Raphael, by His Attorneys, Mark M. Horblit, Benjamin Goldman.

[fol. 67] Bond on appeal for $250.00, approved and filed December 28, 1931, omitted in printing.

[fol. 68] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 6, 1932

To the Clerk of the United States District Court for the District of Massachusetts:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the First Circuit pursuant to an appeal allowed in the above-entitled proceeding and to include in such transcript the following:

1. Agreed statement to be printed as part of record on appeal.
2. Affidavits filed by Clifford S. Drake and Louis F. Buff in qualifying as sureties on bond of Harold A. Dempsey.
3. Petition by Louis Raphael for leave to bring proceedings on said bond, filed March 23, 1931.
4. Order on said petition of Louis Raphael.
5. Ancillary bill of complaint filed April 16, 1931.
5a. Interlocutory decree dated May 4, 1931.
6. Decree on ancillary bill of complaint filed July 16, 1931.
7. Petition for contempt filed by receiver on October 7, 1931.
8. Order on petition for contempt dated October 21, 1931.
9. Motion of George B. Monroe, receiver, filed on November 27, 1931, to amend said order of March 23, 1931.
10. Restraining order and order of notice dated November 30, 1931, and return of service thereon.
11. Plea of Louis Raphael filed December 3, 1931.
12. Stenographic transcript of hearing on said motion and plea hereto annexed.
13. Order on said motion of George B. Monroe entered December 7, 1931.

[fol. 69] 14. Petition for appeal by Louis Raphael from said order of December 7, 1931.

15. Assignment of errors.
16. Bond on appeal.
17. Citation on appeal.

18. Præcipe.
Mark M. Horblit, Benjamin Goldman, Attorneys for Louis Raphael.

Approved.
A. J. Aldridge, Attorney for George B. Monroe, Receiver.

Citation, in usual form, showing service on Andrew J. Aldridge, omitted in printing.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.—Orders of enlargement of time for docketing case to and including March 3, 1932, are here omitted.—A. I. Charron, Clerk.]

[fol. 71] In United States Circuit Court of Appeals for the First Circuit, October Term, 1931

No. 2675

Louis Raphael, Appellant,

v.

George B. Monroe, Receiver, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—June 27, 1932

Bingham, J.:

This is an appeal from an order entered December 7, 1931, in the District Court for Massachusetts in connection with receivership proceedings brought against The Mon-

roe Stores, Inc., enjoining the appellant, Louis Raphael, from further prosecuting a certain suit in the Superior Court of Suffolk County, Massachusetts, except that he might proceed in said cause to judgment, but no further.

The receivership bill was brought against The Monroe Stores, Inc. (hereafter called The Stores), on July 14, 1930, by J. B. Hirshfield & Co., Inc., and other creditors, and later, on July 23, 1930, George B. Monroe of Quincy, Mass., who was the treasurer of The Stores, was appointed receiver. In compliance with an order of the District Court requiring all persons holding claims against The Stores to present their proof to the receiver for allowance on or be- [fol. 72] fore September 30, 1930, Louis Raphael, a citizen and resident of Connecticut, presented his proof of claim on September 25, 1930, and on or about February 9, 1931, it was duly proved and allowed in the sum of $35,000.

Shortly prior to November 26, 1930, one Harold F. Dempsey made an offer to purchase from the receiver all the assets of The Stores, and by the terms of the offer as interpreted and agreed to by the parties he was to pay to its creditors 30 per cent of their claims within thirty days after they had been duly proved and allowed; also to pay within thirty days after allowance the liabilities of the receiver and his expenses. With this offer a bond was filed running to the United States of America and signed by Harold A. Dempsey, as principal, and Louis F. Buff and Clifford S. Drake, as sureties. This bond was in the penal sum of $100,000 and conditioned on compliance "with all the conditions and items of said offer." The bond was duly approved, the offer accepted and, on November 27, 1930, the assets of The Stores were turned over to Dempsey by the receiver.

The amount to be paid Raphael under this offer was $10,500. On March 23, 1931, more than thirty days after his claim against The Stores had been proved and allowed and after having been paid $1,200 thereon by Dempsey, Raphael "as creditor of said Monroe Stores, Inc.," filed a petition for leave to institute proceedings on the bond and, on the same day, leave was granted by the court.

April 9, 1931, Raphael brought suit on the bond in the Superior Court of Massachusetts in which he "obtained

and now has attachments upon the property of said defendants Drake and Buff, and injunctions restraining the transfer by them of certain property to secure the payment of the amount justly due him." In hearings in the state court before a master, to whom the case was referred, both the receiver and his counsel testified. This case was prosecuted by Raphael to a point where, on November 13, 1931, it was ripe for the entering of a final decree against the signers of the bond and in favor of Raphael.

In the meantime, on April 16, 1931, the receiver filed in the receivership proceedings an ancillary bill of complaint [fol. 73] against Dempsey, Buff and Drake, as obligors on the bond, and on May 4, 1931, an interlocutory injunction issued enjoining them from transferring or encumbering their property "until the further order of this court." On July 16, 1931, after notice and hearing, and all parties to the bill consenting, a decree was entered in which it was "ordered, adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83 together with costs be entered against the defendants" Drake, Buff and Dempsey, jointly and severally, and that execution issue forthwith. In this sum of $33,026.33 the claim of Raphael was included, but he was not a party to and did not participate in the proceedings and did not authorize the receiver to act for him therein.

The receiver obtained nothing on the execution and, on October 7, 1931, filed in the District Court a petition for contempt as to defendants Buff and Drake on various grounds. The hearing on this petition resulted in an order directing Buff and Drake to pay the receiver $1,000 on the 20th of October, 1931, and a like sum on the 20th of each month thereafter until the execution issued on the judgment was satisfied, the final disposition of the matter being held pending further orders of the court.

On November 27, 1931, the receiver, appellee here, filed in the original receivership proceedings a motion seeking to have the order of March 23, 1931, granting Raphael leave to bring suit on the bond, modified and that Raphael be enjoined from further prosecuting his cause of action in the Massachusetts court "except insofar as to reduce his claim to judgment." A preliminary injunction against Raphael and an order of notice to show cause was issued, which was served on Raphael's attorney. On December 3,

1931, Raphael appearing specially filed a plea in which he set out the facts in connection with his suit in the state court in detail, asserting that the receiver had no legal interest or standing to entitle him to an order interfering with the state court proceeding; that he was not a party to the proceeding either individually or as receiver; that he had no interest in his, Raphael's, claim; that the receiver in no way represented Raphael and had at no time been authorized to bring proceedings in his behalf; that at the [fol. 74] time of filing the ancillary bill of complaint in the receivership proceedings, the proceeding in the state court had already been commenced and was pending; that Raphael was not made a party to the ancillary bill of complaint and had never taken any part in the hearings thereon or in the contempt proceedings; that he was a resident of Connecticut and no personal service had been made upon him; that having knowledge of the order granting Raphael leave to bring suit against Dempsey, Drake and Buff on the bond and of the subsequent proceedings thereunder the receiver is barred and estopped from attempting to obtain a modification of said order; that he, Raphael, was not interfering or attempting to interfere in any way with the receivership; that said receiver had disposed of all the property of The Stores which came into his hands; and that Drake and Buff were amply able to pay his, Raphael's, claim and such payment would not interfere with the collection by any of said other creditors of the amounts due them. Raphael filed with his plea the report of the master in the state court proceeding.

After a hearing on the receiver's motion to modify and the plea of Raphael, an order was entered by the court modifying said order and restraining the appellant from further prosecuting the suit in the state court except that he might proceed in that cause to judgment but no further. This is the order here appealed from.

The assignments of error are twelve in number but the appellant in his brief has reduced them to six questions:

1. Whether the appellee had any legal standing or interest to entitle him to the order, he having no interest in the state suit.

2. Whether the court had jurisdiction over the appellant, he being a citizen and resident of Connecticut and not having been personally served with the order of notice.

3. Whether the District Court erred in enjoining the appellant from prosecuting his action in the state court, the injunction interfering with appellant's legal right to sue in the state court.

4. Whether equitable principles of laches and estoppel should have been applied.

[fol. 75] **5. Whether the order was warranted on general principles of equity.**

6. Whether the order could lawfully be entered on the "motion".

It is unnecessary to consider the first question as the appellee does not base his right to the injunction on any interest he may have in the suit in the state court but on the ground that the District Court has exclusive jurisdiction of actions on the bond given in the receivership proceedings, the bond, as alleged by him, taking the place of the receivership assets.

The fundamental inquiry is whether the District Court had, by reason of the receivership proceedings, such jurisdiction of the subject matter of the suit in the state court as to authorize it to issue an injunction restraining its further prosecution.

It is well settled that a federal court has no power to enjoin a suit in a state court unless the res in its custody is affected or interfered with (Guardian Trust Co. v. Kansas City Ry. Co., 146 Fed. 337, 340; id. 171 Fed. 43; Kline v. Burke Construction Co., 260 U. S. 226) or its jurisdiction is in some other way defeated or impaired. Hull v. Burr, 234 U. S. 712, 723; Julian v. Central Trust Co., 193 U. S. 93.

The receiver does not question this proposition but contends that in this case the bond in the res in the receivership proceedings; that it stands for and is held by him as a substitute for the assets of The Stores (Dietzsch v. Huidekoper, 103 U. S. 494); and that a suit by a creditor on the bond in another court would defeat and impair the jurisdiction of the federal court previously acquired.

We think this contention as applied to the admitted facts of this case is not sound. It might be said that a bond would take the place of the property purchased, if Dempsey had promised to pay the receiver the purchase price (the 30 per cent of the claims of the creditors). In that case the receiver would have been entitled to receive the

money from Dempsey or sue on the board with the duty of paying out as assets of the estate such funds as he might receive and the District Court would have had exclusive [fol. 76] jurisdiction to direct such proceedings. But that is not the situation here. The assets of The Stores were delivered to Dempsey on his promise to pay the creditors 30 per cent of their claims, and the liabilities and expenses of the receiver. To protect the creditors a bond was required and given running to the United States of America conditioned on the fulfilment of Dempsey's promise to pay the creditors. Whether this bond was held by the receiver or the clerk of court does not appear, but, in either event, the holder was simply acting as a depository, the parties interested in the bond being the creditors, and the receiver only to the extent of the claims against him as receiver and his expenses. All the assets of the receivership having thus passed from the jurisdiction of the District Court without reservation and the creditors having to look to the purchaser rather than to the receiver for the payment of the dividends on their claims, all that remained for that court to do was to allow the claims of the creditors and settle the account of the receiver. There was no res in the custody of the District Court and there were no matters left over requiring judicial action of that court in relation to the receivership property or to any rights litigated in the receivership proceedings making necessary any further orders or decrees to establish the rights of the parties therein, which were or could be interfered with by the suit in the state court. The suit in the state court is not against The Stores or its assets in the custody of the federal court, but is one in personam against certain parties, strangers to the receivership proceedings, who have given a bond conditioned to pay Raphael's claim against The Stores.

Under these circumstances, even if Raphael's suit had been brought against Dempsey, the purchaser, and any assets of The Stores which he had purchased and which might have been in his possession had been attached to satisfy any judgment obtained therein, the jurisdiction of the District Court would not have been defeated or impaired for it had parted with all interest in and control over those assets. A fortiori this is so where the property attached or sequestered in a suit is property in which the receivership estate never had an interest and the suit is on

[fol. 77] a bond in which the receiver, except as pointed out above, never had an interest.

No leave of court to sue the obligors on the bond was necessary. But if it was, the suit was not to assert a claim against assets in the custody of the District Court, but was one in personam against the principal and the sureties on the bond.

Again, whatever the order granting leave to sue amounted to, it was a final decree (Odell v. Batterman, 223 Fed. 292), was granted on March 23, 1931, and could not be modified or revoked on December 7, 1931, after the term at which it was entered had expired, and the court had lost control of the matter.

Then again, after Raphael had been granted leave to sue and had commenced proceedings in personam in the state court, that court obtained jurisdiction and "the rule that, when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached the right cannot be restrained by proceedings in any other court, applies to protect the jurisdiction of the State court unless the case is within some recognized exception to § 265 of the Judicial Code." Riehle v. Margolies, 279 U. S. 218, 223. Here, as in that case, "there is no basis for any such exception."

Furthermore, the state court, having rightfully taken jurisdiction of Raphael's bill against Dempsey and his sureties on the bond, had by means of attachments of tangible property of the defendants Drake and Buff and orders restraining them from transferring or encumbering their other property, the judicial custody of such property, and valid legal and equitable liens thereon were created in favor of the plaintiff. Snyder v. Smith, 185 Mass. 58; Rioux v. Cronin, 222 Mass. 131; Metcalf v. Barker, 187 U. S. 165; Pickens v. Roy, 187 U. S. 177. And assuming that the ancillary bill brought by the receiver in the receivership proceedings was in the nature of a creditor's bill brought for his benefit and all others similarly situated, the injunction issued by the District Court on the filing thereof could not avail to give that court jurisdiction over property already rightfully in the custody of the state court. Covell v. Heyman, 111 U. S. 176; Picknes v. Roy, 187 U. S. 177; Kline v. Burke Construction Co., [fol. 78] 260 U. S. 226. In any event if, by the preliminary injunction, any right or power could, under the circum-

stances disclosed, have been obtained over the property of Dempsey, Buff and Drake, it was lost when the injunction was dissolved by the final decree in the District Court, not having continued the injunction. Sweeney v. Hanley, 126 Fed. 97; Gardner v. Gardner, 87 N. Y. 14.

In the plea of Raphael it is alleged that "Drake and Buff are possessed of property of a value far in excess of the amount of their obligation to said Raphael and to the other creditors * * * whose claims have been proved and allowed"; and that Drake and Buff are "amply able forthwith to pay said obligation to said Raphael * * * and that such payment to him will not interfere with the collection by any of said other creditors of the amounts due them." In the preparation of the record on this appeal it was agreed by the parties that "the statements set forth in the plea of Louis Raphael * * * with respect to said proceedings in the Suffolk Superior Court * * * and with respect to the proceedings in said United States District Court * * * are true." It is evident, therefore, that no question of preference by Raphael over the other creditors is involved.

The suggestion that the order of the District Court allowing Raphael to bring suit on the bond in the state court was a nullity is based on the idea that the jurisdiction of the District Court over that suit was exclusive, and that it was exclusive because the United States had an interest in the bond and therefore was a real party plaintiff within the meaning of Section 24 of the Judicial Code. The United States was a nominal party only; it had no interest in the bond or the suit upon it. The relator, Raphael, was the real plaintiff. Howard v. United States, 184 U. S. 676, 680.

Then again, if the United States had been a real party plaintiff within the meaning of the first paragraph of Section 24, the District Court then would not have had exclusive jurisdiction, for Section 24 only confers original jurisdiction. Section 256 of the Judical Code defines the "cases and proceedings" over which the courts of the United States have exclusive jurisdiction. It does not include [fol. 79] suits where the United States is a party plaintiff as defined in the first paragraph of Section 24.

The bond was not a federal statutory bond, and it was optional with Raphael to bring suit upon it either in the

federal or state courts, there being diversity of citizenship and the requisite amount involved. The decision in U. S. F. & G. Co. v. Kenyon, 204 U. S. 349, is without application in this case. There the bond sued was a federal statutory bond (raised a federal question), but the amount involved was less than $2,000, the then requisite amount. The jurisdiction of the federal court was there upheld under the first clause of Section 24, for the United States had an interest in the bond and was a real party plaintiff.

Taking the view we do as to the questions here discussed, it is unnecessary to deal with the other points raised by the appellant.

The order or decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant.

DISSENTING OPINION

MORTON, J. (dissenting):

The essential facts are simple. In an equity receivership pending in the District Court, the receiver was authorized to sell the property in his custody for payment of the expenses of the receivership and thirty per cent of all claims which might be filed by a certain date and allowed by the court. To secure payment according to the agreement, the buyer, Dempsey, gave a bond with sureties in the sum of $100,000.00 running to the United States. Raphael was one of the creditors. He appeared in the receivership proceedings and proved his claim; and it was allowed for $35,000.00. Dempsey defaulted on his payments. Raphael obtained leave of the District Court to sue Dempsey and his sureties on the bond in the State Court. Suit was accordingly brought there by Raphael in the name of the United States of America, on his relation, as plaintiff, and was prosecuted nearly to final judgment. The property of the defendants was attached in that suit and is still held under the attachment. After Raphael's suit had been begun the receiver brought suit on the bond by [fol. 80] a supplementary bill in the District Court, in the name of the United States, and a final judgment was entered therein against Dempsey and his sureties for $33,026.00, which includes the amount due to all creditors including Raphael.

After obtaining this judgment the receiver moved in the District Court that the leave theretofore granted to Raphael to sue in the State Court be revoked and further proceedings therein by him be enjoined, except the entry of judgment. From the allowance of this motion and the granting of the injunction, the present appeal was taken.

The suit on the bond is clearly within the general jurisdiction of the federal courts. The Judicial Code provides, "The District Court shall have original jurisdiction as follows: First: Of all suits of a civil nature, at common law or in equity brought by the United States, or by any officer thereof authorized by law to sue," etc. (sec. 24). It is well settled that on bonds taken in the name of the United States there is jurisdiction under this statute. (Howard v. United States, 184 U. S. 676; U. S. F. & G. Co. v. Kenyon, 204 U. S. 349.) The contrary view was followed in United States v. Sheridan, 119 Fed. 236; United States v. Barrett, 135 Fed. 189, which were overruled by the Kenyon decision.

The suit by the receiver and his recovery of a complete judgment covering the claims of all parties under the bond greatly changed the situation from what it was when leave to sue in the State Court was granted to Raphael. It became a question whether one creditor should be allowed to press his claim in competition with the receiver who was acting for all creditors and for the estate. In forbidding him from doing so, I think the District Judge was plainly right. The contrary view leads to the curious spectacle of one creditor being permitted to compete against the receiver and the other creditors, to obtain a preference to which he is not entitled, through the means which were adopted to safeguard the payment of the purchase price for which the receivership property was sold. Raphael's complaint against the injunction order is that it deprives him of this advantage and puts him on an equality with the other creditors,—which I think is where he belongs, while my brethren apparently think him entitled to his preference.

[fol. 81] I also differ from my brethren in their construction of the bond, as being suable by individual creditors for their own benefit. It is conditioned only that Dempsey

shall fulfill his contract with the receiver; there is nothing in it about creditors or their claims. In my opinion it was suable only on the relation of the receiver by whom it was taken and with whom the contract which it secured was made. The present bond differs from those given to protect material men, in that a receiver is here interposed between the creditors and the obligors. Even as to bonds of this general character, expressly conditioned on the payment of specified claims, I am aware of no case in which they have been held to create such individual rights of action as are here approved. When one creditor sues on them it must be on behalf of all. Under the majority decision, Dempsey's default in payment under his contract set up a free-for-all on the bond, open to all creditors with allowed claims,—for it is not to be supposed that the court would grant leave to sue to one and refuse it to another,—in which the prize, the assets of the obligors, goes to the quickest and smartest. It seems to me an unfortunate, as well as an erroneous, result.

Notwithstanding the dictum in the Howard case, supra, there is, I think, grave doubt whether the State Court had any jurisdiction of the suit on the bond in the name of the United States. The words "Of all suits", in sec. 24, have usually been understood as conferring exclusive jurisdiction. In the entire history the Massachusetts Supreme Judicial Court (according to the table of cases in the digest) only one action, not resting on some special statute, has ever been brought in the name of the United States. 254 Mass. 173,—a claim on a check taken by the United States which was drawn on a State trust company which failed and was being liquidated under direction of the State Court. The Dempsey bond and all proceedinggs on it were, essentially, parts of the liquidating receivership in the District Court. The whole thing ought to have been retained there. The order permitting suit in the State Court, if it amounted to anything, was ill-advised. The District Judge was right in recognizing that fact and revoking the order.

[fol. 82] On April 13, 1932, this case came on to be heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twenty-seventh day of June, A. D. 1932, the Opinion of the Court (page 71) and a dissenting opinion (page 79) were filed and the following Final Decree was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—June 27, 1932

This cause came on to be heard April 13, 1932, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was submitted on briefs by leave of court.

Upon consideration whereof, It is now, to wit, June 27, 1932, here ordered, adjudged and decreed as follows: The order or decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, with costs to the appellant.

By the Court.

Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,104. U. S. Circuit Court of Apppeals, First Circuit. Term No. 407. George B. Monroe, receiver, petitioner, vs. Louis Raphael. Petition for a writ of certiorari and exhibit thereto. Filed September 27, 1932. File No. 37,104.